90-1774

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TYSON FOODS, INC. *Petitioner*

VS.

LEWIS STEPHEN WORK, ET AL. *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER PLAINTIFFS WHO HAVE ARGUABLY MADE A GOOD-FAITH ALLEGATION OF CONTINUING VIOLATIONS OF THE CLEAN WATER ACT, BUT THEN FAIL TO PROVE POST-COMPLAINT VIOLATIONS, MAY RECOVER FOR WHOLLY PAST VIOLATIONS.

II.

WHETHER A TRIAL COURT MUST FIND THAT AN INDIRECT DISCHARGER HAS CAUSED INTERFERENCE OR PASS THROUGH BEFORE IMPOSING LIABILITY UNDER THE CLEAN WATER ACT.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT PLAINTIFFS FROM RECOVERING BOTH STATUTORY PENALTIES AND PUNITIVE DAMAGES FOR THE SAME ALLEGED VIOLATIONS OF THE CLEAN WATER ACT.

LIST OF ALL PARTIES TO THE PROCEEDING

The plaintiffs at the time the suit was filed below included Steve Work; Margaret Work; John Work; Theta Shipman; Eugene Shipman; Virgil Hammons; Clythy Hammons; Graydon Bullock; Given Bullock; Ivan Swor; Blossom Swor; Jay F. Wilson; Rena M. Wilson; Noah F. Wilson; Lema Bea Wilson; Joe C. Wilson; Allen Slavens; Cybil Slavens; Jerry Goen; Kyle Wallace; Mary Wallace; Don Harrington; Wilma Harrington; Clifford (Fornie) McGehee; Danny F. Wilson; Treva Wilson; Harold Collins; Maxine Collins; Patrick Collins; Dennis Rhoades; Peggy Rhoades; Keri Rhoades; James Rhoades; Russell French; Barbara French; Joe Erwin; June Erwin; Roy Smith; Joy Smith; Eugene Underdown; Lois Underdown; Gene Combs; Glenna Combs; David G. Bombs Edd Grisham; Sue Grisham; Patricia Hudson; Evelyn Bayer; Roy F. Hayhurst; Cecilia Hayhurst; Luke Anderson; Mary Anderson; John David Bailey; Jo Ann Bailey; Kim Bailey; Roger Hall; Tommie Hall; Aaron Hall; Chad Hall; Henry L. Shudy; Betty Shudy; Arlis McGehee; Patty McGehee; Brandon McGehee; Eric McGehee; Justin McGehee; David M. Granger; William L. Pittenger; Clarence Wheaton; Carolyn Wheaton; Marvin Russell; Kenneth Cochran; Doris Cochran; John A. Proctor; Carolyn Proctor; Loman Maybee; Ira Peden; Delta Peden; Liz Wilson; Janice Wallace; J. R. Snow; Fairye Snow; A. H. Dillwith; Claris Dillwith; Kenny Smothers; Blinda Faye Smothers; Charles Whitney; Viola Whitney; Arthur Ratzhaff; Ann L. Ratzhaff; Fred McGehee; Edith McGehee; Terry Hayhurst; Ralph Zizza;

Frances Zizza; Fred M. Massengale; Freddie Massengale; Clay G. Battin.

The defendants at the inception of the case were: Tyson Foods, Inc.; Don Tyson; Tom McElroy; Carroll Snyder; Jewell Wise; Leland Tollett; City of Green Forest, Arkansas; Mayor Billy F. Johnson; James E. Eldridge; Arkansas Department of Pollution Control and Ecology; Phyllis Garnett; United States Environmental Protection Agency, Region VI; Robert Layton; Hon. Lee M. Thomas; Arkansas Department of Health; and Ben Saltzman.

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OPINIONS BELOW

After a jury verdict returned on June 19, 1989, the United States District Court for the Western District of Arkansas entered a final judgment in favor of respondents. *Work v. Tyson Foods, Inc.*, 720 F.Supp. 132 (W.D. Ark. 1989) (Appendix at A-45). On August 24, 1989, the court entered its order assessing penalties against petitioner in accordance with the jury verdict. (Appendix at A-62). The United States Court of Appeals for the Eighth Circuit affirmed the judgment in part and reversed in part, in a decision rendered on December 18, 1990. *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990). (Appendix at A-1). On February 14, 1991, the Eighth Circuit denied separate petitions for rehearing filed by respondents and petitioner as well as petitioner's suggestion for rehearing en banc. (Appendix at A-66).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 18, 1990. The Court of Appeals denied the parties' petitions for rehearing and petitioner's suggestion of rehearing en banc on February 14, 1991. The period during which a Petition for Certiorari may be filed in this Court expires on May 15, 1991. This Petition is timely, and the Court has discretionary jurisdiction to consider this case pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Clean Water Act

33 U.S.C. §1365. Citizen suits

(a) **Authorization; jurisdiction.** Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)

who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) **Notice.** No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of

such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) **Venue; intervention by Administrator.**

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter or right.

(d) **Litigation costs.** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) **Statutory or common law rights not restricted.** Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation. For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act.

(g) Citizen. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors. A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

STATEMENT OF THE CASE

Respondents filed this action against petitioner and the City of Green Forest, Arkansas, on March 3, 1987, alleging common law claims and violations of various federal environmental laws, particularly section 505 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1365. The United States District Court for the Western District of Arkansas had jurisdiction over the case pursuant to subsection (a) of that section.

Petitioner is a poultry processor. Its process wastewater is piped to the Green Forest Publicly Owned Treatment Works (POTW) for treatment. Respondents alleged that this wastewater overloaded the POTW, causing the city to violate its National Pollutant Discharge Elimination System ("NPDES") permit both before and after July 1, 1985, when petitioner completed construction of an advanced wastewater pretreatment facility at its poultry plant.

Petitioner sought a directed verdict on the CWA claim, on the ground that its plant played no role in the city's permit violations after 1985 because pretreatment always reduced the pollutants in its wastewater to levels below the "local limits" required by ordinance. Therefore, petitioner argued, any violations of the city's permit caused by wastewater from the plant were wholly in the past at the time the respondents filed their complaint, and any violations after 1985 were the result of inadequacies in the design and operation of the POTW.

There was no proof at trial that the POTW ever exceeded permit limits after July 1988, when the city finished upgrading it to comply with EPA requirements.

In its amended answer, petitioner raised several constitutional objections to respondents' claims for punitive damages. Petitioner also objected at trial to respondents' punitive damages claims, in part because they were based on alleged violations of the CWA and because an award of punitive damages in addition to any statutory penalty assessed would violate the eighth and fourteenth amendments. Petitioner further contended that such an award would contravene Congress's intent that CWA penalties should be paid to the Treasury of the United States.

The district court denied petitioner's motion for directed verdict on CWA liability. It refused to instruct the jury on "interference" or "pass through," which are the Congressionally articulated standards establishing liability for indirect dischargers. It also refused to advise the jury that citizen plaintiffs may not obtain relief for wholly past violations of the Act, and did not require the jury to determine whether petitioner was reasonably likely to cause recurring intermittent violations. Although the district court granted petitioner's motion for directed verdict on respondents' claims for punitive damages, it did so solely on the ground that respondents had failed to satisfy the requirements of Arkansas law relating to such damages; the trial court did not reach petitioner's constitutional arguments and the court of appeals did not dis-

cuss them.

The district court entered judgment upon a jury verdict in favor of respondents for 43 permit violations and on some of the common law claims. It then assessed penalties against petitioner in the amount of $43,000. Petitioner's motion for judgment notwithstanding the verdict, on the ground that any violation it caused was wholly in the past when respondents filed their complaint, was denied by the district court.

In its memorandum opinion of August 24, 1989, the district court concluded that the respondents had made "good-faith allegations of ongoing violations." *Work v. Tyson Foods, Inc.*, 720 F.Supp. at 138. It noted that the trial testimony included evidence of "at least some reasonable likelihood of a recurrence of intermittent violations," in part because petitioner's plants in other states (none of which was at issue below) were also alleged to be in violation of the CWA. *Id.* at 137-38. Deciding not to disturb this conclusion, the court of appeals affirmed the CWA judgment against petitioner. It also reinstated respondents' punitive damages claims, concluding that the district court had misconstrued the applicable Arkansas law.

ARGUMENT

I.

WHETHER PLAINTIFFS WHO HAVE ARGUABLY MADE A GOOD-FAITH ALLEGATION OF CONTINUING VIOLATIONS OF THE CLEAN WATER ACT, BUT THEN FAIL TO PROVE POST-COMPLAINT VIOLATIONS, MAY RECOVER FOR WHOLLY PAST VIOLATIONS.

Apart from the requirement of standing to commence an action under section 505(a) of the CWA, 33 U.S.C. §1365(a), citizen plaintiffs must prove ongoing violations of the Act at trial. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987). Because the district court refused to give an instruction on the issue, however, the jury made no finding on whether such violations existed at the time this suit was filed. In affirming, the Eighth Circuit reasoned that the *Gwaltney* requirements were nevertheless satisfied, because respondents made good-faith allegations of continuing violations, and the district court was convinced the record contained "substantial evidence" that intermittent violations would recur. *EPA v. Green Forest,* 921 F.2d at 1406. This Court should grant the petition for writ of certiorari because a verdict establishing CWA liability without a finding of either ongoing or intermittent violations is both contrary to *Gwaltney* and in conflict with the decisions of the Fourth, Fifth and Ninth Circuits.

On remand from this Court in *Gwaltney*, the Fourth Circuit recognized that good-faith allegations

of ongoing violations did not obviate the need "for further findings as to whether, on the merits, plaintiffs proved at trial an ongoing violation." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988) (per curiam) (on remand). Similarly, the Fifth Circuit has acknowledged that *Gwaltney* requires the trial court to "differentiate between the plaintiff's standing to bring the suit and whether, after a trial, the citizen-plaintiffs could prevail." *Carr v. Alta Verde Indus., Inc.*, 924 F.2d 558, 560 (5th Cir. 1991) (per curiam). Likewise, the Ninth Circuit recognized "that citizen plaintiffs must eventually prove the existence of ongoing Clean Water Act violations or the reasonable likelihood of continuing future violations to prevail on the merits." *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 670 (9th Cir. 1988).

In the Fourth Circuit, as in the Ninth, citizen plaintiffs may establish ongoing violations either by showing that violations continued after the date of the complaint, or by proving that there is a reasonable likelihood that intermittent or sporadic violations will recur. *Gwaltney*, 844 F.2d at 170-171. Adopting the Fourth Circuit standard, the Fifth Circuit determined in *Carr* that plaintiffs who had standing to sue nevertheless failed to establish the likelihood of future discharges. 924 F.2d at 560-61. Because the *Carr* defendants implemented a system "designed, constructed and operat[ing]" to limit the offending discharge before the plaintiffs filed their complaint, the Fifth Circuit found CWA relief inappropriate. *Id.* at 561. The Eighth Circuit should have reached a similar result here.

Carr, *Gwaltney* and *Sierra Club* all involved bench trials. Accordingly, the Fifth Circuit reviewed the district court's findings as to ongoing violations under a clearly erroneous standard, *Carr*, 924 F.2d at 560, and the Fourth Circuit affirmed on appeal following remand in *Gwaltney* on the ground that the trial court's conclusion was that of "a reasonable trier of fact," *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4th Cir. 1989).[1] In contrast, this case was tried to a jury, which never addressed (indeed, was never instructed to address) the existence of ongoing violations.[2] Nonetheless, the Eighth Circuit perceived "no reason to disturb[] *Judge Harris'[s] finding*" that there was "substantial evidence" of ongoing violations. *EPA v. Green Forest*, 921 F.2d at 1406 (emphasis added). In reality, however, Judge Harris found only that the evidence in the record was sufficient to support a finding of ongoing violations. *Work v. Tyson Foods*, 720 F.Supp. at 138. Since he was not sitting as trier of fact, his observation was no substitute for the jury's finding of fact on this point, and the Eighth Circuit should not have treated it as such.[3] *See Sierra Club*, 853

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1. The standard of review was not material to the Ninth Circuit's disposition in Sierra Club.

2. Petitioner requested an instruction requiring the jury to determine the existence of ongoing violations, or, in the alternative, the last day of violations caused by petitioner. The district court did not give that instruction.

3. The CWA is a penal statute, as reflected by the 1987 amendments which impose criminal penalties for violation of the Act, Water Quality Act of 1987, Pub. L. No. 100-4, tit. III, §312, 101 Stat. 41 (1987); therefore, the trial court's application of the most relaxed standard of proof available—"substantial evidence"—was itself inappropriate. Similarly, the court of appeals failed to apply meaningful scrutiny to the trial court's treatment of the question of ongoing violations.

F.2d at 671 (refusing to take "judicial notice" of evidence of ongoing violations absent finding by trier of fact "in the first instance"). In any event, the trial court's expressed conclusion on this point stands in striking contrast to its action: it found no reason to order injunctive relief or any of the other equitable remedies available when future violations are a genuine concern.

This Court should also review the judgment below in order to clarify its decision in *Gwaltney*. Justice Scalia noted, writing separately in *Gwaltney*, that the Court's opinion can be interpreted to provide that "the plaintiff can never be called on to prove [the] jurisdictional allegation" which gives rise to standing. 484 U.S. at 67-68 (Scalia, J., concurring).[4] Although the Fourth, Fifth, and Ninth Circuits have interpreted *Gwaltney* differently, it may be that the Eighth Circuit agrees with Justice Scalia's reading of the case, since it failed to require respondents to prove their jurisdictional allegations. This case therefore squarely presents the question of whether such proof is necessary to recovery. Petitioner respectfully submits that the Court should provide guidance to lower courts on this important point, especially in light of the conflict between the Eighth Circuit's conclusion here, and the determination by three other courts of appeals that such proof is a prerequisite to relief under the CWA.

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4. Justice Scalia would have remanded the case for a determination as to whether the petitioner was "in fact 'in violation' on the date suit was brought." Gwaltney, 484 U.S. at 69. He opined that, absent such a requirement, the majority "interprets the [CWA] to confer subject matter jurisdiction over a class of cases in which, by the terms of the statute itself, there cannot possibly be standing to sue." Id. at 71.

II.

WHETHER A TRIAL COURT MUST FIND THAT AN INDIRECT DISCHARGER HAS CAUSED INTERFERENCE OR PASS THROUGH BEFORE IMPOSING LIABILITY UNDER THE CLEAN WATER ACT.

This Court should also grant the petition in order to clarify the proof necessary to establish indirect discharger liability under the CWA. Petitioner, which discharges its pretreated process wastewater into a POTW, is a statutorily defined indirect discharger. *EPA v. Green Forest*, 921 F.2d at 1398. As such, it cannot acquire an NPDES permit (and has never had one), although the POTW into which it discharges is required to maintain such a permit.

The CWA's complex regulatory scheme treats indirect dischargers like petitioner quite differently from POTWs with respect to violations of the Act. As this Court recognized, an indirect discharger may be held liable under the CWA only if it both caused and significantly contributed to a permit violation. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985), *rev'd on other grounds National Ass'n of Metal Finishers v. EPA*, 719 F.2d 64 (3d Cir. 1983) ("NAMF").

In this case, however, both the trial court and the Eighth Circuit imposed CWA liability upon a finding merely of factual proximate cause. The Act requires more, because just as the common law does not

impose liability without proof of common law fault, the CWA does not impose liability unless the statutory requirements are proved. *See, e.g.*, 40 C.F.R. §403.3(i) (definition of required causation).

The lower courts' casual approach to causation had a significant impact here, since the Water Quality Act of 1987 added criminal penalties to the CWA. As a penal statute, the Act must now be strictly construed, *see, e.g., United States v. Campos-Serrano*, 404 U.S. 293 (1971), and there is no reason to believe that a mere finding of proximate cause is sufficient to meet its strict causation requirements. On the contrary, the Act's comprehensive liability provisions, and the exhaustive and detailed regulations promulgated to effect their application, indicate that CWA liability attaches only when an indirect discharger is found to have caused, in the technical sense contemplated by the Act, precisely the behavior prohibited. Therefore, instructions explaining the CWA to a jury must strictly follow its language, leaving no ambiguity which might cause the jury erroneously to impose liability for conduct which does not violate the Act.

Here, however, the trial court gave only three CWA instructions, two of which the Eighth Circuit recognized "were wholly irrelevant to this case," since they addressed liability for direct, not indirect, dischargers. *EPA v. Green Forest*, 921 F.2d at 1406. The third, intended solely to assist the jury in determining the number of violations—if any—for which petitioner might be held liable, did not include information necessary to a deter-

mination of liability. It contained, for example, neither a definition of "interference" nor of "pass through"; this omission prevented the jury from understanding that an indirect discharger is liable under the CWA only if it either "disrupted" or "inhibited" the operation of the POTW so as to cause it to violate its NPDES permit, or if it released pollutants into the POTW which could pass through it without adequate treatment and so cause the POTW to violate its permit.[5] Instead, it merely directed the jury to find the petitioner in violation of the CWA if it in any sense "caused" the city to violate its permit, and provided the jury no other legal guidance. So instructed, the jury could not (and obviously did not) make a reasoned determination of petitioner's liability for violating the CWA. Nor could the jury have found, as *Gwaltney* requires, that petitioner (in contrast to the POTW) was in violation of the Act when respondents filed their complaint.

Thus, this case presents the question whether indirect dischargers are to be held to the same standards under the CWA as are direct dischargers. In deciding this question, the Court will resolve the uncer-

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5. Petitioner maintained below that, throughout much of the relevant period, no controlling definitions of interference and pass through existed, since this Court upheld that portion of the Third Circuit's decision in NAMF which voided the definitions promulgated before 1985; constitutionally acceptable definitions appeared only shortly before respondents filed their complaint in 1987. The interim definitions of interference and pass through proposed in 1985 have been carried forward, virtually verbatim, into the present EPA Effluent Guidelines. See 50 Fed. Reg. 25,526 (1985) (now codified at 40 C.F.R. §403.3) (proposed June 19, 1985). Those Guidelines provide the only objective criteria by which an indirect discharger's liability may be measured. The jury in this case, however, was not made aware of them.

tainty caused by the apparent conflict between the regulatory principles limiting the imposition of liability on indirect dischargers, and the Eighth Circuit's apparent holding that the actions of indirect dischargers are to be measured instead against the broad standards applicable to point sources holding NPDES permits.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT PLAINTIFFS FROM RECOVERING BOTH STATUTORY PENALTIES AND PUNITIVE DAMAGES FOR THE SAME ALLEGED VIOLATIONS OF THE CLEAN WATER ACT.

This case also presents the question of whether recovery of punitive damages for the same violations punishable under the CWA amounts to an excessive fine and violates the due process clause. Specifically, the Court should grant the petition to determine whether respondents may resort to the Arkansas law of punitive damages to supplement the penalty provisions of the CWA, when these statutory penalties, like punitive damages at common law, are intended to exact punishment from wrongdoers.[6] *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987).

Although the CWA was not intended to displace all common law remedies, 33 U.S.C. §1365(e), Congress there provided a detailed framework of statutory penalties, payable to the United States Treasury and not to individual plaintiffs. The penalties exacted from CWA defendants are payable to the government because their transgressions are public, and not private, wrongs. Therefore, citizen plaintiffs in CWA actions should not be

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6. Should this Court grant the petition and resolve the punitive damages issue in petitioner's favor, respondents' case against petitioner will be over.

able to obtain individual monetary recoveries through the simple expedient of characterizing NPDES permit violations and other acts prohibited by the CWA as "willful" or "wanton" breaches of state law tort duties. Congress obviously intended the financial penalties for such violations to benefit the public fisc; it did not intend to provide a windfall to the individuals who filed a particular CWA action.

When CWA plaintiffs attempt to recover punitive damages on negligence and nuisance claims merely by recounting a defendant's alleged violation of the CWA, the courts can, and certainly should, examine the substance of those common law claims. The claims must be viewed with disfavor if, as here, they simply mask an attempt to vitiate the comprehensive regulatory scheme set out in the CWA. As this Court has recognized, Congress intended the statutory penalties to punish and deter those who violate the CWA. *Tull*, 481 U.S. at 422 n.7. An award of punitive damages would thus be inconsistent with the regulatory program articulated by Congress.

In addition, the CWA's provision for significant monetary penalties for each day of violation,[7] when distorted by a jury's unbridled discretion to award puni-

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7. The Water Quality Act of 1987 increased the maximum penalty to $25,000 a day and added provisions for criminal penalties. In this case, the $10,000 maximum penalty was therefore applicable to all CWA violations alleged to have occurred before the effective date of the amendments, while the $25,000 maximum penalty applied to those alleged to have occurred after that date.

tive damages for the same conduct, implicates the excessive fines clause of the eighth amendment.[8] Petitioner acknowledges, of course, that the excessive fines clause is irrelevant to cases between private litigants. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989). This limitation applies, however, only "when the government neither has prosecuted the action nor has any right to receive a share of the damages award." 492 U.S. at 263-64. In a CWA action, in contrast, the standards of conduct sought to be enforced are defined by government regulation, the right to enforcement arises from the delegated exercise of the police power, and any monetary sanction imposed flows to the government's coffers.

Thus, when plaintiffs couch their claims for punitive damages in terms of NPDES permit violations, their CWA enforcement action implicates the prosecutorial power of the government because they stand in the shoes of the EPA.[9] *See, e.g.*, 33 U.S.C. §1365(a), (b) (citizen plaintiffs substitute for primary governmental enforcers). This power, in turn, animates the eighth amendment's protections against abuse of official power and imposition of excessive fines. This case therefore presents

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8. Although the Court found it unnecessary to decide the point in Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 n.22 (1989), the nature, history, and purpose of the eighth amendment demonstrate that the constitutional safeguard against excessive fines applies to corporations as well as to individuals, see 492 U.S. at 283-84 (O'Connor, J., concurring and dissenting), and it is therefore fully applicable here.

9. This may explain petitioner's inability to find any case in which the EPA has recovered, or even sought recovery for, punitive damages in addition to statutory penalties.

in sharper focus the concerns underlying the issue left open in *Browning-Ferris:* whether a *qui tam* action implicates the excessive fines clause.[10] 492 U.S. at 276 n.2.

Respondents sought to demonstrate petitioner's willful or wanton state of mind by alleging that petitioner engaged in conduct proscribed, not by state law, but by federal statute and regulation.[11] Under these circumstances, the concept of "fine," in the sense of recompense for an offense to the sovereign, *see Browning-Ferris,* 492 U.S. at 264-65, applies both to statutory penalties and to punitive damages. The eighth amendment therefore dictates that the Court determine whether such fines are, in combination, excessive.

The court below apparently sanctioned duplicative punishment meted out by separate decision makers, neither of which is required to take note of the considerations which motivated the other. Surely such unprincipled imposition of penalties leads to fines which are inherently unfair and excessive, for Congress intended that only trial judges, not trial judges and juries seriatim, perform the "highly discretionary calculations necessary

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10. Although the CWA, unlike the antitrust laws, dows not provide for plaintiffs to share in the fines imposed, they nonetheless benefit from any injunctive relief granted and so share in the government's recovery. CWA actions are therefore so closely analogous to qui tam actions as to be considered such for these purposes.

11. Thus, this case is not controlled by Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984), in which this Court determined that claims for punitive damages are not prempted by the Atomic Energy Act. Unlike respondents, who rely explicitly on the provisions of the CWA in framing their claims for negligence and nuisance, the plaintiff in Silkwood did not rely on federal law or regulation to supply any element of the common law claim for which he sought recovery.

to award civil penalties after liability is found" in CWA cases. *Tull*, 481 U.S. at 425. These calculations, entrusted to the discretion of the trial judge, are designed to yield fines appropriate to the offenses proved; an additional sanction intended solely to inflict further punishment for the same conduct is unnecessary, for it will neither advance the Congressional purpose underlying the CWA nor serve further to deter potential violators. The trial judge's decision about the amount of the appropriate CWA penalty should be, as Congress intended, final. In this case in particular, the penalty imposed by the court need not be supplemented by the jury, since the remedial action sought (advanced pretreatment) began almost two years before respondents filed their complaint.

Even if the CWA's comprehensive regulatory scheme admits in some instances of supplemental penalties, Arkansas's system for the award of punitive damages cannot itself withstand constitutional scrutiny. Unlike the Alabama mechanism at issue in *Pacific Mut. Life Ins. Co. v. Haslip*, _ U. S._, 111 S.Ct. 1032 (1991), Arkansas law contains no "established post-trial procedures for scrutinizing punitive awards," no requirement that the trial court articulate its reasons for rejecting or accepting the amount of a jury's award, and no established factors intended to guide the trial court's consideration. *Id.* at 1044. Nor have Arkansas appellate courts applied the detailed substantive standards which apparently mark Alabama appellate review. *Id.* at 1045. *Compare* Brill, *Punitive Damages in Arkansas–Expanded? Restricted?*, 1990 Ark. L. Notes, 25, 30 (Board of Trustees of

the University of Arkansas) (no guidelines or objective standards govern award of punitive damages in Arkansas). The Arkansas system instead relies completely on the conscience of the individual judge. *See Maxwell v. Walser*, 296 Ark. 70, 73, 751 S.W.2d 351, 353 (1988) ("shock the conscience" standard); *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 1044, 479 S.W.2d 518, 523 (1972) (same); *see also* Ark. Code Ann. §16-64-123 (damages may be set aside as excessive if verdict "rendered under the influence of passion or prejudice").

The Arkansas law of punitive damages is therefore much closer to that of Vermont and Mississippi than to that of Alabama, and the Court recently expressed concern about both those models. *See Browning-Ferris; Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). In fact, when approving the Alabama procedure at issue in *Pacific Mutual*, the Court noted its dissatisfaction with review based only on such ill-defined concepts as "manifest[] and gross excessive[ness]" or evidence of "passion, bias and prejudice on the part of the jury so as to shock the conscience." 111 S.Ct. at 1045 n.10. At best, the Arkansas system offers only such inadequate guidance to trial courts and juries. *See, e.g.*, Arkansas Model Instructions ("AMI") §2217 (3d ed.. 1989) (punitive damages appropriate "to punish a wrongdoer and to deter others").[12] It therefore offends the constitutional

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12. Respondents tendered AMI 2217 as their only proposed instruction on punitive damages. Since the trial court directed a verdict in petitioner's favor on punitive damages, however, that instruction was never given.

guarantee of due process.

Review of the award of punitive damages in this case thus presents the Court with the opportunity to resolve two troubling questions. It will enable the Court to declare unequivocally that statutory penalties under the CWA are functionally equivalent to punitive damages at common law. It will also enable the Court to outline the procedures necessary to protect defendants from trial courts' standardless acceptance of unprincipled jury awards.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1661-WA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee,

v.

CITY OF GREEN FOREST, ARKANSAS,

Appellee,

LEWIS STEPHEN WORK, et al.,

Appellants/Intervenors

Appeal from the United States District Court
For the Western District of Arkansas

Nos. 89-2549-WA, 89-2636-WA, 90-1011-WA
& 90-1041-WA

LEWIS STEPHEN WORK, et al.,

Appellants/Cross-Appellees

v.

TYSON FOODS, INC., AND
CITY OF GREEN FOREST, ARKANSAS, et al.,

Appellees/Cross-Appellants

Argued: October 10, 1990
Filed: December 18, 1990

Before LAY, Chief Judge, BRIGHT, AND TIMBERS,[1] Circuit Judges.

TIMBERS, *Circuit Judge:*

Appellants Lewis Stephen Work, et al. (the citizens or Work) appeal from two orders entered December 3, 1987 and March 24, 1989 in the Western District of Arkansas, Oren Harris, *Senior District Judge.* The first denied intervention in a government environmental enforcement action or consolidation of that action with an earlier citizens' action. The second denied another motion for intervention in the Environmental Protection Agency (EPA) action. The citizens appeal also from final judgments entered June 19, 1989 and August 24, 1989 after trial of the citizens' action. Appellee/cross-appellant Tyson Foods, Inc. (Tyson) appeals from the final judgments. Tyson also appeals, and the citizens cross-appeal, from the denial of Tyson's motion for reconsideration filed November 28, 1989. All appeals have been consolidated.

Work commenced the citizens' action against Tyson and the City of Green Forest (the City or Green Forest) on March 3, 1987, asserting claims pursuant to both the Clean Water Act (the act or CWA), 33 U.S.C. §§1250-1387 (1988), and common law. On September 28, 1987, the EPA commenced an action against

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[1] Of the Second Circuit, sitting by designation.

Green Forest and the State of Arkansas pursuant to the CWA. The government enforcement action resulted in a consent decree. The citizens' action proceeded to trial, resulting in a verdict against Tyson under the CWA; against Tyson and for the citizens on the common law claims; and for Green Forest on the citizens' remaining claims. The court previously had granted partial summary judgment for the City, dismissing the CWA claims against it. The court assessed penalties against Tyson pursuant to the CWA, payable to the United States Treasury.

On appeal, Work sets forth a laundry list of claimed errors by the district court: (1) in denying their motion to intervene and/or denying their motion to consolidate; (2) in dismissing their claims against Green Forest under the CWA; (3) in calculating the penalties assessed against Tyson under the CWA; (4) in various evidentiary and instruction-related matters; and (5) in dismissing medical claims of ten employees, directing a verdict against Patricia Hudson, and directing a verdict to deny an award of punitive damages.

On cross-appeal, Tyson also claims that the district court erred in various other respects, including: (1) in its instruction to the jury on discharger liability; (2) in failing to grant Tyson's motion for a directed verdict; and (3) in failing to grant Tyson's motion to dismiss.

For the reasons set forth below, we reverse the second order of the district court denying intervention in the government enforcement action and remand for

the limited purpose of assessing attorneys' fees; we affirm the final judgment entered in the citizens' action with respect to the CWA claims; and we affirm in part and reverse in part with respect to the common law claims.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. We also summarize briefly the statutory background of the CWA.

(A)

The CWA, enacted in 1972, creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). As part of that program, §301(a) of the Act, 33 U.S.C. §1311(a), prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including §402, 33 U.S.C. §1342, which establishes the National Pollution Discharge Elimination System (NPDES).

Section 402(a) provides that the EPA shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. §1342(a). Section 402(b) allows each state to develop and administer its own permit program, provided that the program meets federal requirements. 33 U.S.C. §1342(b). And Section 402(c) provides that the EPA shall suspend issuance of federal permits upon determining that a state has adequate authority to implement and en-

force the permitting program within the state. 33 U.S.C. §1342(c).

The Act directed the Administrator of the EPA to promulgate regulations setting limits on the pollution that can be discharged, delineated by three general types of "point sources," *id.* at §1362(14): sources that discharge pollutants directly into navigable waters (direct dischargers); publicly owned treatment works (POTWs), which engage in the treatment of industrial sewage or industrial wastewater, *id.* at §1292(2); and sources that discharge their pollutants not into navigable waters but into the POTWs (indirect dischargers). *National Ass'n of Metal Finishers v. EPA (NAMF)*, 719 F.2d 624, 633 (3d Cir. 1983) (discussing statutory framework of the CWA) *rev'd on other grounds sub nom. Chemical Mfrs. Ass'n v. N.R.D.C., Inc.*, 470 U.S. 116 [1985]). "Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs, or could pass through the POTWs without adequate treatment." *Id.* Section 307(b)(1) of the Act provides that:

> The Administrator shall . . . publish proposed regulations establishing pretreatment standards for introduction of pollutants [into POTWs] for those pollutants which are determined not to be susceptible for treatment by such treatment works or which would interfere with the operations of such treatment works. . . . Pretreatment standards under this subsection . . . shall be es-

> tablished to prevent the discharge of any pollutant through [POTWs], which pollutant interferes with, passes through or otherwise is incompatible with such works.

33 U.S.C. §1317(b)(1).

For POTWs, the Administrator was to set effluent limitations based on "secondary treatment," *id.* at §§1311(b)(1)(B) and 1314(d)(1). These limitations were to be applied through the NPDES permit for each POTW. *Id.* at §1342; *NAMF*, *supra*, 719 F.2d at 633.

The Act authorizes several different enforcement actions if a NPDES permit holder fails to comply with the specified permit conditions. Section 309 authorizes the United States to enforce a federal or state permit through a variety of administrative, civil, and criminal mechanisms. 33 U.S.C. §1319. A state may take similar action, under appropriate state law, in response to a state-issued permit. *Id.* at §1342(b)(7). In addition, Section 505(a)(1) of the Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of . . . an effluent standard or limitation under this chapter," *id.* at §1365(a)(1), which includes a federal or state NPDES permit or condition thereof, *id.* at §1365(f). No such action, however, may be commenced under the following circumstances:

> (A) prior to the sixty days after plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any

> alleged violator of the standard, limitation, or order, or
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

Id. at §1365(b)(1)(b).

The CWA specifically provides that statutory and common law rights are not restricted: "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . . " *Id.* at §1365(f).

(B)

Green Forest is a small town in the Ozark Mountains of northwest Arkansas. It is located in Carroll County, which has a topography known as "karst." Karst is permeable limestone readily penetrated by surface water. Streams frequently submerge and re-emerge. Streams having an intimate contact with the groundwater system through sinkholes or other means are called "losing streams."

In 1953, the City constructed its POTW at its present location on Dry Creek, a losing stream. Dry Creek flows through the area where Work and other citi-

zens who commenced the citizens' action live. It is into Dry Creek that the POTW discharges.

In 1959, a poultry processing plant, Franz Foods, was constructed and began discharging a growing waste load into the POTW. Franz Foods was acquired by Tyson in 1968.

In December 1968, the City sought federal funding to construct a new POTW capable of meeting secondary treatment standards. In the grant application process, the EPA approved plans and specifications for the new POTW subject to conditions, including limitations on Tyson discharges. In May 1973, the City requested an NPDES permit, as required by the CWA, to operate its new POTW and discharge into Dry Creek, indicating the POTW should be capable of secondary treatment of waste. The limitations on Tyson discharges however were not enforced. Tyson did not pretreat its waste or produce an effluent meeting the required criteria until 1985.

During the early 1970s, residents east of the City (including several of the citizens involved in this case) sued Tyson's subsidiary, Franz Foods, for maintaining a public nuisance. That action was settled in 1976 after the City's new POTW was completed; Franz Foods agreed not to discharge any waste that would alter Dry Creek's existing condition visually or chemically, or that constituted a violation of any City ordinance, or county, state or federal law.

The loading on the POTW continued to grow, and the POTW failed to meet the standards of its original permit. At the trial of the citizens' action, Tyson's expert witness admitted that, without pretreatment, there would be no way that a waste from a poultry-processing plant like Tyson's could comply with the POTW's design criteria.

The City received periodic warnings from environmental agencies regarding permit violations and other problems. When the POTW permit expired on May 1, 1977, a new permit was drafted. The Arkansas State Department of Pollution Control & Ecology wrote to the Mayor, stating the need for the City to negotiate a schedule of compliance with Franz Foods. In 1978, on a single-shift operation, Tyson processed approximately 260,000 pounds of chicken per day. In 1979, Tyson processed approximately 310,000 pounds of bird per day. POTW permit violations continued.

In April, 1981, the EPA issued a new NPDES permit to the City for its existing facility, requiring an effluent that met higher-quality water standards. In view of the City's inability to meet those standards, an administrative order set interim limits and a timetable for compliance.

In May 1983, a sinkhole opened in Dry Creek. The creek's entire flow ran directly into the ground. At this point, the POTW had a volume in excess

of 1,000,000 gallons per day.

At some point in 1984, Tyson's production changed from a cut-up operation to a deboning operation, working with larger birds; this change increased its waste. Tyson then processed approximately 750,000 pounds of chicken per day.

In August 1984, the Arkansas Department of Health advised the City that a number of wells in the immediate vicinity of the sinkhole were being affected; that public water should be made available to the affected residents; and that the City should make efforts to improve the quality of the POTW's effluent.

Tyson completed a pretreatment facility in May 1985. Once it went on-line, the quality of the City's POTW effluent improved dramatically, falling from levels equivalent to diluted domestic sewage to levels well below secondary treatment standards. Tyson, however, continued to be the principal load on the POTW, which in turn continued to violate its now-strict permit. In 1986 Tyson converted to a double shift operation, processing 92 birds per minute per shift; this change was made in anticipation of increasing production capacity to 140 birds per minute per shift.

(C)

On November 28, 1986, the citizens sent notice to all parties, as required by 33 U.S.C. §1365(b)(I)(A), of their intent to sue Tyson and the City

pursuant to the CWA. After the action was commenced, the EPA commenced a separate environmental enforcement action. On November 25, 1987, Work filed a motion in the EPA action seeking intervention as of right and seeking consolidation. On December 3, 1987, the court denied the motions. Work did not appeal immediately from the order denying these motions.

On January 28, 1989, after engaging in settlement negotiations, the government lodged a proposed consent decree with Green Forest. An opportunity for public comment was provided. On March 17, Work filed a second motion to intervene in the government action. On March 24, the court again denied the motion. On March 29, the court approved the proposed consent decree. On April 20, Work filed a notice of appeal from the orders denying their motions to intervene of December 3, 1987 and March 24, 1989.

The separate citizens' action proceeded to trial. On April 12, 1989, the court entered partial summary judgment in favor of Green Forest, dismissing Work's CWA claims. The court found that the approved consent decree between the EPA and Green Forest precluded the citizens from pursuing their CWA claims. On May 12, after a six-week trial, the jury returned a verdict against Tyson for $254,401.50 on Work's common law claims and found Tyson guilty of 43 CWA violations. On June 16, the citizens moved for assessment of CWA penalties against Tyson. On June 19, judgment was entered in favor of the City and against Work, and in favor of Work

and against Tyson for common law damages. On June 29, Tyson moved for judgment n.o.v. This was denied on August 24, at which time the court assessed $43,000 against Tyson for CWA violations. Judge Harris' opinion assessing penalties is published at *Work v. Tyson Foods, Inc.*, 720 F.Supp. 132 (W.D. Ark. 1989). On September 7, Tyson moved for reconsideration, for judgment n.o.v., or for a new trial. Those motions were denied on November 28.

II.

(A)

We turn first to the threshold question of our jurisdiction to entertain Work's appeal, filed April 20, 1989, from the denial of two motions to intervene in the EPA action. Work claims that his motions for intervention should have been granted as of right. 33 U.S.C. §1365(b)(1)(B) and Fed. R. Civ. P. 24(a)(1); *see also United States v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (holding that the CWA conferred upon a citizens' group intervention as of right).

It is well-settled that an order denying a motion to intervene as of right is a final appealable order. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 524 (1947); *Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175, 176 n. 1 (8th Cir. 1978); *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983).

A notice of appeal from such an order must be filed within sixty days. Fed. R. App. P. 4(a)(1). In the

instant case, the notice of appeal from the denial of the first motion to intervene was not until after nearly sixteen months. Since an appellate court lacks jurisdiction over an untimely appeal, *United States v. Metropolitan Dist. Comm'n*, 865 F.2d 2, 4 (1st Cir. 1989), we lack jurisdiction over the December 3, 1987 order denying intervention.

The appeal from the second order presents a closer question. On its face, the appeal was filed timely: the order was entered March 24, 1989 and the appeal was filed April 20. Relying largely on *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972), however, appellees claim that the second motion "was merely a back door attempt to revive the trial court's earlier order so as to start the time for appeal running anew."

In *Hodgson*, the district court denied the appellant's first motion to intervene as of right on March 10, 1972. On June 20, the district court denied appellant's second motion to intervene. The appellant timely appealed the denial of the second motion. 473 F.2d at 122-23. On appeal, the court held that "the question of jurisdiction must be resolved by ascertaining whether the June 20 order . . . was merely a reinstatement of the court's March 10 ruling or whether it constituted a new determination by the District Court reached under circumstances materially changed from those existing in March." *Id.* at 125. The court went on to say that "[i]f the later order was only an attempt to revive the earlier order, it did not start the time for appeal all over again." *Id.* Ultimately, the court held that there were "changed circumstances"

such that "the June 20 order . . . constituted a fresh evaluation of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court." *Id.* at 126-27.

Here, too, we find that the context in which the citizens sought intervention on March 17, 1989 was different from the context in which intervention and consolidation had been sought on November 25, 1987. By March 17, 1989, there was a proposed consent decree between the EPA and the City. In their second motion, the citizens made specific reference to the proposed settlement and articulated their specific objections to the consent decree as well as their concern (which was later confirmed) that it would be the basis for defendants' moving for dismissal of the citizens' action on the ground of collateral estoppel. Although the citizens had expressed concerns about possible settlement sixteen months earlier, the settlement possibility, in 1987, was merely inchoate. Consistent with *Hodgson*, we hold that the existence of the proposed consent decree resulted in a change in circumstances that made a renewed motion for intervention legitimate.

(B)

Since we find it appropriate to exercise jurisdiction over the appeal from the March 24, 1989 order, we hold that the court erred in denying the citizens leave to intervene, since the CWA expressly provides for intervention as of right. *Metropolitan St. Louis Sewer Dist., su-*

pra, 883 F.2d at 56. Since we find, however, that the district court's denial of the motion, for the most part, was harmless error, we reverse and remand on that issue only for the limited purpose of permitting the citizens group to seek attorneys' fees.

Although Judge Harris denied Work's formal intervention order, the citizens, *de facto*, were permitted to participate. As Judge Harris stated in his order, the citizens had the opportunity, of which they took advantage, to file their objections to the consent decree during the available public comment period. There is little else that they could have done had they formally intervened. *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83, 85 (D. Alaska 1977) (holding that "once intervenors have been given the opportunity to object to the decree they have had an appropriate day in court and a judgment on consent may be entered"). In that case, a consent decree under the CWA was entered over objections of environmental groups.

In denying the citizens' motion to intervene, Judge Harris relied explicitly on our decision in *DuBois v. Thomas*, 820 F.2d 943 (8th Cir. 1987). There we held that the district court was without subject matter jurisdiction to entertain a citizens' action commenced to compel the EPA to take investigatory and enforcement action, duties which we held were discretionary rather than mandatory. Although Judge Harris' reliance on *DuBois* in denying the citizens' intervention motion was somewhat misplaced, as a practical matter, *DuBois*, sup-

ports our holding that the error here was largely harmless. That is so because commencing an enforcement action against Green Forest in the first instance was a discretionary rather than mandatory duty. Hence ultimately settling the action also was within the EPA's discretion. Had the citizens intervened, they still would not have been able to compel a consent decree on their own terms. As we said in *DuBois*, the CWA "was not intended to enable citizens to commandeer the federal enforcement machinery." *Id.* at 949.

The citizens assert, however, that the denial of the intervention motion robbed them of their right to seek attorneys' fees. They point out that the citizens' suit pre-dated the EPA action, and that their efforts were instrumental in spurring the EPA into finally taking action against the City. This has some force. We agree that the citizens should be permitted to seek their fees.

Accordingly, while we will not second-guess the terms of the consent decree itself, we reverse the denial of intervention insofar as it precluded the citizens from seeking their fees, and we remand the case on this issue for the district court to determine the proper amount of such fees.

III.

We turn next to the citizens' appeal from the district court's denial of their motion to consolidate. Work asserts that, since there was little or no difference between the issues presented in both actions, their motion

to consolidate should have been granted.

Although Work failed to designate that the citizens were appealing from the denial of the motion to consolidate as well as the denial of the motion to intervene, that omission was not prejudicial to appellees. Notices of appeal are to be liberally construed. Fed. R. App. P. 3(c); *McGowne v. Challenge-Cook Bros. Inc.*, 672 F.2d 652, 659 (8th Cir. 1982). We have jurisdiction to review the court's denial of consolidation on the merits.

Pursuant to Fed. R. Civ. P. 42(a), a district court "may order" consolidation. The order denying Work's motion to consolidate should not be disturbed unless it is determined that the court clearly abused its discretion. *Shump v. Balka*, 574 F.2d 1341, 1344 (10th Cir. 1978); *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir. 1973); 9 Wright & Miller, Federal Practice and Procedure, §2383 (1971); *see also Chicago, Rock Island & Pacific R.R. v. Williams*, 245 F.2d 397, 404 (8th Cir.), *cert. denied*, 355 U.S. 855 (1957) (discussing court's discretion pursuant to Rule 42[b]). The record here supports the district court's denial of the motion to consolidate. The citizens sought punitive damages, compensatory damages for personal injuries, and relief for many common law tort claims. These claims were not relevant to the EPA action. Moreover, the citizens' claims were to be tried before a jury, while the EPA action was to be tried before the court.

We hold that, in denying Work's motion to consolidate, the court properly exercised its discretion in

the interests of expedition and economy.

IV.

We turn now to the CWA claims raised by both Work and Tyson.

First, the citizens assert error in that they never had a chance to present their CWA claims against Green Forest. The district court found that the citizens were precluded, by the doctrines of res judicata and collateral estoppel, from pursuing their CWA claims. We agree that res judicata barred these claims.

The doctrine of res judicata was articulated in *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983), in which we explained that

> The doctrine of res judicata bars a later suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies. . . . [B]oth [collateral estoppel and res judicata] are applied only when the party against whom the earlier decision is being asserted had a 'full and fair opportunity' to litigate the issue in question.

Work concedes that the CWA claims made in the citizens' suit were the same as those made by the EPA. He argues, however, that since the citizens were not

involved in the action that resulted in the consent decree, they should not have been precluded from pursuing their CWA claims independently. We disagree.

The citizens' action provision of the CWA casts the citizen in the role of a private attorney general. *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990). As the Supreme Court stated in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), however, the CWA was intended to be enforced primarily by the government:

> The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that '[t]he Committee intends the great volume of enforcement actions to be brought by the State,' and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'

(Quoting S. Rep. No. 92-414, p. 64 [1971], *reprinted in* 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 [1973]).

In *Gwaltney* the Court held that citizen suits could not be brought for wholly past violations of the Act, stating that permitting such suits "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 50. *See also DuBois, supra*, 820 F.2d at 949 (the CWA allows citizens

to **supplement** government enforcement power).

In this case, we are faced squarely with the question of whether citizens' claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA action. Recognizing the preeminent role that government actions must play in the CWA enforcement scheme, we hold that they are.

The preclusive effect of a consent decree on a private enforcement action was addressed by the court in *United States v. Olin Corp.*, 606 F.Supp. 1301 (N.D. Ala. 1985). There, the State of Alabama and the United States sought injunctive relief to require the Olin Corporation to eliminate DDT from, and restore the environment in, the vicinity of Redstone Arsenal. As part of the resolution of the case, Olin, the United States, and Alabama entered into a consent decree.

The court stated that "once a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights." *Id.* at 1304. The court held that the question whether the [citizens'] suit was barred by res judicata turned on whether the prior litigation was a *parens patriae* suit. "In a proper *parens patriae* suit, the state or federal government is deemed to represent all of its citizens."

Traditionally, *parens patriae* lawsuits involved a government suing to enjoin alleged nuisances

caused by water or air pollution." *Id.* at 1305. The court held that the plaintiffs' suit for injunctive relief was barred by res judicata because the same relief had been sought in the action brought by Alabama and the United States in a *parens patriae* capacity. *Id.* at 1308; *see also Student Pub. Interest Group, Inc. v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1432 (D. N.J. 1985) ("The consent judgment which resolved the previous lawsuit against defendant forecloses subsequent litigation as to all claims adjudicated therein.")

In this case, the citizens place great emphasis on the fact that their action was commenced prior to the EPA enforcement action; they suggest that because the CWA expressly provides that citizens cannot commence an action before giving the EPA sixty days notice, 33 U.S.C. §1365(b)(1)(A), the failure of the EPA to commence an enforcement action within that time frame means that "the subsequent filing of an enforcement action by the Government could not supplant the citizen enforcement action already pending." We recognize that there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action. In view of the consent decree in the instant case negotiated by the EPA and Green Forest, however, this is not such a case.

Some lower courts in other circuits have reached a result contrary to the one we reach today. *E.g.*, *Atlantic States Legal Found., Inc. v. Koch Refining Co.*, 681 F.Supp. 609, 614 (D. Minn. 1988) (holding that district

court had "no discretion" to dismiss a properly filed citizen suit when a government enforcement action was later brought covering the same claim); *Sierra Club v. Coca-Cola Corp.*, 673 F.Supp. 1555 (M.D. Fla. 1987) (consent decree entered into by the EPA and the defendant did not require dismissal of the Sierra Club action for the same CWA violations when the Sierra Club, a third party in the case, did not consent). In view of the preeminent role that must be afforded the EPA in enforcing CWA act violations—a role contemplated by the legislative history and recognized by the Supreme Court in *Gwaltney*—we hold that it was proper for the district court to dismiss Work's CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree. See our discussion under Part II(B), *supra.* Fines recoverable pursuant to the CWA are payable to the United States Treasury and would not have been recovered directly by the aggrieved citizens had their action continued. While the citizens might have preferred more stringent terms than those worked out by the EPA, such citizens are no more aggrieved than citizens who are precluded from commencing an action in the first instance because of pending agency action.

Although the issue was not framed in terms of res judicata or collateral estoppel, the comments of the

Southern District of New York in *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F.Supp. 1004 (S.D. N.Y. 1988) are instructive. Responding to "HudFish's" argument that dismissal of its citizens' action would leave the group without a remedy, the court stated:

> We are particularly unimpressed with this latter argument. The thrust of the CWA is to provide **society** with a remedy against polluters in the interest of protecting the environment. Section 101 of the CWA, 33 U.S.C. §1251(a). If the Government's action achieves that end, the fact that HudFish or any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh. The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void. That does not mean, however, that HudFish is *de facto* entitled to its own 'personalized' remedy in this or any other CWA case.

Id. at 1052

It should be borne in mind that the citizens in this case were permitted to prosecute their CWA claims against Tyson, as well as their common law claims against both Tyson and the City. It was only the CWA claims that the district court found to be barred by res judicata and collateral estoppel.

We hold that that ruling was proper.

(B)

Tyson's claim that the court erred in refusing to dismiss claims against it based on res judicata, however, need not detain us long. In essence, Tyson asserts that the EPA's decision **not** to commence an action against it is binding upon the citizens. This novel proposition flies in the face of the clear language of the citizens' action provision of the CWA, as well as the legislative history, which make clear that agency inaction is precisely the circumstance in which private action is appropriate. *Student Pub. Interest Research Group, supra,* 615 F.Supp. at 1427 ("Defendant's interpretation of the Act would render citizen suits impossible when they are required most: instances where an agency encourages a polluter to believe its unlawful behavior will go unpunished.")

We next address Tyson's argument that its motion to dismiss should have been granted because of the lack of regulatory definitions of "interference" and "pass-through." See our discussion of the statutory framework of the CWA, under Part I(A), *supra.*

The CWA regulations provide that "[a] User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. §403.5 (1989). Tyson relies on the holding in *NAMF, supra,* 719 F.2d at 640-41, *rev'd on other grounds sub nom. Chemical Mfrs. Ass'n v. N.R.D.C., Inc., supra,* 470 U.S. 116,

to support its contention. Tyson misreads the holding in *NAMF*. As we have pointed out, *NAMF* merely held "that liability could not be imposed on industrial users without proof of causation." *Arkansas Poultry Fed'n v. EPA*, 852 F.2d 324, 328 (8th Cir. 1988). The *NAMF* court rejected a definition of "interference" that would have created liability for causing or "significantly contribut[ing]" to a violation of an NPDES permit, 719 F.2d at 639, holding that:

> We conclude that given the language and purpose of the Act, an indirect discharger cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation or sludge problem. **If the definition of 'interference' required that an indirect discharger be both 'the cause of' and 'significantly contribute to' the POTW's permit violation, it would be consistent with the causation requirement.** As written, however, the definition fails to require such causation, and thus violates the clear meaning of the Act.

Id. at 641 (emphasis added).

While the *NAMF* court rejected the then-existing regulatory **definitions** of "interference" and "pass-through," 719 F.2d at 641, the regulatory **prohibitions**, as Work points out, remained intact. We agree with the citizens that the CWA's prohibitions against "interference" and "pass-through" are not unconstitutionally vague, but adequately apprised Tyson that it was not to cause the City to violate its NPDES permit.

We hold that the district court properly denied Tyson's motion to dismiss.

(D)

We next address Tyson's claim that the district court erred in denying its motion for a directed verdict pursuant to *Gwaltney, supra,* which held that citizens' actions are not permitted for wholly past violations of the CWA. 484 U.S. at 59. Tyson points out that it constructed an advanced pretreatment facility at substantial expense, which went on-line in 1985, subsequent to which Tyson claims it "never exceeded the agreed local limits designed for optimum operation of the POTW."

The citizens assert that violations of the City's permits continued after 1985. Work asserts further that Tyson's reliance on the affirmative defense of compliance with local limits does not get Tyson off the hook. CWA regulations provide for an affirmative defense for compliance with a local limit if that limit was **designed to prevent pass through and/or interference,** 40 C.F.R. §403.5(a)(2)(ii)(A) (1989), and if the POTW user "did not know or have reason to know that its Discharge, alone or in connection with discharges from other sources, would cause Pass Through or Interference." *Id.* at §403.5(a)(2)(i). We agree with Work that Tyson has not established these conditions.

Gwaltney makes clear that the citizens' suit provision "confers jurisdiction over citizen suits when the

citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation. . . . " 484 U.S. at 64. Judge Harris, in this case, explicitly found that "[a] review of the plaintiff's second amended complaint makes it indelibly clear that the plaintiffs have made good-faith allegations of ongoing violations by Tyson." *Work*, *supra*, 720 F.Supp. at 137. The judge found, moreover, that there was "substantial evidence adduced at trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating. . . . " *Id.* at 138. Our review of the record discloses no reason for disturbing Judge Harris' finding in this regard.

We hold that the district court properly denied Tyson's motion for a directed verdict.

(E)

Tyson also claims that the court erred in instructing the jury on discharger liability under the CWA. True, two of the instructions given by Judge Harris—those relating to direct discharger liability and liability applicable to NPDES permit holders—were wholly irrelevant to this case. Tyson is an indirect discharger and thus could not be liable pursuant to those theories.

We hold, however, that this error was cured when Judge Harris subsequently gave the jury the proper instructions on indirect discharger liability. The judge stated:

> Also, if you find by a preponderance of the evidence that Tyson Foods, Inc. has violated the Clean Water Act by causing the City of Green Forest, Arkansas, to violate a provision of its Clean Water permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act.
>
> In order to make this determination, you must determine how many violations by the City of its Clean Water Act permit were caused by Tyson Foods, Inc.

The evidence adduced all related to Tyson's role as an indirect discharger. The jury's verdict was consistent with the instructions given by the judge with respect to indirect discharger liability. In *EEOC v. Atlantic Community School Dist.*, 879 F.2d 434, 437 (8th Cir. 1989), we explained that "[j]ury instructions are subject to the 'harmless error' rule requiring a determination of whether the error affected the substantial rights of the parties." (citations omitted).

We hold that in this case the judge's error in giving superfluous instructions relevant only to direct dischargers and permit holders was harmless, in light of his correct instruction on indirect discharger liability.

(F)

This brings us to Work's claim that the district court erred in assessing $43,000 in penalties against Tyson for CWA violations. The jury found Tyson guilty of 43 separate violations. The court assessed penalties in the amount of $1,000 per violation. *Work*, *supra*, 720 F.Supp. at 139.

Work claims that the district court erred in declining the citizens' request to instruct the jury that a violation of a thirty-day average effluent limitation constitutes thirty separate daily violations of the Act. *Atlantic States Legal Found.*, *supra*, 897 F.2d at 1139. We agree with the majority of the courts that have addressed the issue that violation of a monthly average effluent should be counted as thirty separate violations. *Id.* at 1139. We find, however, that the district court's failure specifically to articulate this rule in its jury instructions in this case was harmless error.

In *Atlantic Community School District*, *supra*, we held that the district court's failure to give a proposed instruction did not affect the relevant party's "substantial rights":

> Because EEOC's theory of the case was apparent to the jury throughout the trial, and because the instructions given neither failed to guide the jury on the central issue of age discrimination nor inhibited the jury in making such a finding, error in failing to give the proposed instruction, if error there

> were, would have been harmless. In sum the jury could have, but simply chose not to, agree with EEOC's theory of the case.

879 F.2d at 437 (citation omitted).

In this case, too, the jury could have agreed with Work that Tyson was guilty of many more than 43 violations of the CWA. The court simply instructed the jury that it was required to "determine how many violations by the City of its Clean Water Act permit were caused by Tyson Foods, Inc." Work's expert testified at trial that there were 720 violations "assuming that a violation of the 30-day average permit for administrative order requirement is tantamount to 30 separate daily violations. . . . " As Tyson points out, however, there also was evidence from which the jury could have concluded that the problems with the POTW were primarily the fault of the City rather than Tyson. Furthermore, the jury had before it reports of discharges calculated on a daily, weekly, and monthly basis.

In the district court's opinion, where, *inter alia*, it assessed penalties against Tyson, the court stated that it "construe[d] the decisions of the jury to be that there were violations on **43 separate days.**" *Work*, *supra*, 720 F.Supp. at 138 (emphasis added). Earlier in that opinion, the court stated that it had heard and had the benefit of the entire record in the case. *Id.* at 137. The opinion indicates, moreover, that the court considered the law applicable to the assessment of penalties. For example, in the section addressing *Gwaltney*, the court referred to the Fourth Circuit's holding that each violation of monthly

averages for discharge of pollutants amounts to a violation for each day of the month. *Id.* at 135.

We find no reason to disturb the court's construction of the jury award; nor do we find that its failure to use Work's proffered jury instruction was anything other than harmless error, if indeed it was error at all. The jury was made aware, through counsel's questions, that it could find more than 700 violations of the CWA if it so chose. Although we would be more comfortable with the jury instructions if they had clearly articulated the rule with respect to monthly average permit violations, its failure to do so was at most harmless error.

Work argues further, however, that the court erred in assessing only a $1,000 fine per violation. We disagree. We hold that the assessment was within the proper exercise of the court's discretion.

Work relies almost exclusively on the Eleventh Circuit's decision in *Atlantic States, supra,* for the proposition that the district court erred in failing to assess higher penalties. In *Atlantic States,* the court of appeals held that the district court abused its discretion in levying no penalty whatsoever against the defendant after violations of the CWA had been established. The court stated that "[w]hile the amount of penalty to be levied is discretionary with the district court, its determination, based solely on the good faith efforts of [the defendant] to comply with the law, that no penalty was appropriate was and would be an abuse of discretion." 897 F.2d at 1142.

The court remanded the case to the district court with the direction that, if it chose not to impose the maximum penalty under the Act, it "reduce the fine **in accordance with the factors spelled out in section 1319(d),** clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." *Id.* at 1142 (emphasis added). In the instant case, unlike in *Atlantic States,* the court did impose a penalty after considering, in substance, the matters contemplated by 33 U.S.C. §1319(d).

Section 1319(d) provides that violators shall be subject to a maximum penalty of $10,000 for violations before February 4, 1987 and $25,000 for violations thereafter. It also provides that:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and any such other matters as justice may require.

33 U.S.C. §1319(d).

In its opinion addressing penalties, the district court here explicitly considered "the extent of violations as well as the number of violations through the years"; "[a]bility to pay and litigation considerations"; and "the policy by EPA in arriving at just and reasonable penalties under the statute." *Work, supra,* 720 F.Supp. at

138-39. The court also stated that:

> Defendant Tyson has strongly contended that a new facility of the defendant was undertaken and is now in place, operating to alleviate the previous violations at a cost in excess of a million dollars. The defendants insist that the flow of wastewater from its plant through the facility of Green Forest would prove [sic] and has already without question alleviated the previous violations.

Id. at 138.

The district court, in its opinion, relied on the old version of §1319(d), which was in effect at the time the citizens' action was commenced. 720 F.Supp. at 135. At the time the court assessed penalties, that section had been amended to provide for higher penalties and to provide specific factors, set forth above, for district courts to consider when assessing penalties. While not referring to the new §1319(d), however, in essence the court considered precisely those factors Congress found appropriate—i.e., defendant's conduct, good faith, and financial situation.

We hold tha the court's failure precisely to invoke the talismanic language of the new §1319(b) does not rise to the level of reversible error. We affirm the court's assessment of CWA penalties.

We have considered the parties' other claimed errors with respect to the CWA, and we find

them to be without merit.

V.

We turn next to Work's claimed errors with respect to various evidentiary rulings made by the district court, relevant to both the CWA and common law claims. Work claims that the court erred in applying a "statute of limitations" to the evidence that it permitted to be introduced in Work's case against Tyson. The statute of limitations for CWA violations is five years. The court excluded evidence pre-dating that period. Work also claims error in that the court excluded evidence of a settlement in prior litigation reached between Franz Foods (Tyson's subsidiary) and some of the citizens in the instant case.

Work points out that the evidence of prior violations was relevant to such issues as Tyson's knowledge and culpability, even if Tyson could not be held liable for violations pre-dating the statute of limitations period. Furthermore, he points out that, pursuant to Fed. R. Evid. 408, a settlement can be introduced in evidence for purposes other than to show liability.

Work is right that there is no rule that automatically excludes evidence pre-dating a statute of limitations period. In this case, it may have been error for the court automatically to exclude considerable evidence that was relevant to Tyson's culpability. Most of the evidence that Work claims should have been admitted, however, was relevant primarily for determining punitive damages. As stated below, we are remanding the case for the pur-

pose of deciding the issue of punitive damages. To the extent the evidence was not admitted where it might have had some tangential relevance to other claims, however, we hold that the error was harmless, particularly since the evidence would have been largely cumulative with respect to many of Work's claims for relief. As for the admissibility of such evidence, we have made it clear that "[e]ven with a clear showing of abuse, the error must have affected the substantial rights of the parties to warrant reversal of the district court." *Hogan v. American Tel. & Tel. Co.*, 812 F.2d 409, 410 (8th Cir. 1987). Any such error in the instant case did not rise to that level.

With respect to the exclusion of the settlement agreement, suffice it to refer to "our rule that the trial court's ruling on the admissibility of evidence will not be disturbed absent a clear and prejudicial abuse of discretion." *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 461 U.S. 30 (1983). The exclusion of the settlement agreement was well within the court's discretion.

VI.

This brings us to Work's claimed errors with respect to the trial of the common law claims.

(A)

Turning first to the directed verdict against an award of punitive damages, a review of the record makes clear that the court was under a misapprehension of the law with respect to the relevant Arkansas law. The

court stated that:

> Punitive damages is a harsh rule of law.
>
> . . . .
>
> You've got the intent of intentional injury, and I don't think there's any testimony in any of this record at all that would serious [sic] contend that Green Forest or Tyson in their own mind and heart were going to do this intentionally just to punish. If you can show me any testimony othersise, I probably could be persuaded.

The judge's view that a directed verdict was appropriate because Tyson did not "intentionally" pollute "just to punish" was error as a matter of Arkansas law.

We recently summarized Arkansas law on punitive damages and explained that the issue had been properly submitted to the jury in a case involving exposure to chemicals:

> For punitive damages to be awarded under Arkansas law, the plaintiffs must show malice, either express or inferred. Inferred malice requires that the defendant knew or should have known of the potential harm, but proceeded anyway with conscious indifference to the possibility of injury. Witnesses testified at trial that Dow knew of the dangers of DBCP as early as 1961, and yet did nothing. Open cans of DBCP were dumped in open waste pits, and the smell of the chemical was repeatedly detected in the

> plant. Dow took no precautions to protect its employees. This evidence was sufficient to justify submitting the punitive damages issue to the jury.

Loudermill v. Dow Chemical Co., 863 F.2d 566, 571 (8th Cir. 1988).

Under Arkansas law, knowledge and indifference are enough for punitive damages. The Arkansas Supreme Court expressly has held that a deliberate intent to injure is not required. *National By-Products v. Searcy House Moving Co.*, 292 Ark. 491, 494, 731 S.W.2d 194, 195-6 (1987).

In this case, the fact that Tyson may not have intended to "punish" the citizens is not dispositive of the punitive damages issue. There was evidence from which the jury could have inferred that Tyson knew the risk involved to drinking water because of its chicken operations, and yet Tyson acted for years with indifference to that risk.

We hold that the court erred in directing a verdict against an award of punitive damages and we remand the case for determination of that issue. In retrying that issue, the court should consider carefully the admissibility of evidence predating the applicable statute of limitations period and should exclude evidence only if its prejudicial value outweighs its probative value. Fed. R. Evid. 403.

(B)

We next address the citizens' contention that the court erred in directing a verdict against Patricia Hudson and against the medical claims of ten citizens. We hold that the court erred in this respect.

Hudson's claim was for alleged damage to real property. Counsel for Tyson asserted that "the credible testimony in the record is that she received fair market value [for her property] without regard to any alleged pollution." Hudson, however, had testified at trial that water pollution had devalued her land by $69,000—the difference between what she and her husband paid for the property and what they ultimately sold it for. In arguing against Tyson's motion for a directed verdict, counsel for the citizens pointed out that there was evidence on both sides, and that the question of property damage should be left for the jury. The court, however, ruled that "on the question of credibility, I will grant the motion."

The court clearly usurped the jury's role in ruling on Tyson's motion. We have made it clear that, in ruling on a motion for a directed verdict, the court should consider only evidence favoring the non-moving party. *Dace v. ACF Indus.*, 722 F.2d 374, 376 (8th Cir. 1983). Granting such motions is appropriate only where the evidence is such that, **without weighing the credibility of the witnesses,** there can be but one reasonable conclusion as to the verdict. *Mulholland v. Schneider Service Co.*, 661 F.2d 708, 711 (8th Cir. 1981). In the instant case, the court explicitly considered credibility in granting Tyson's mo-

tion. Indeed, credibility was the very basis for his ruling.

In view of this clear error, which prejudiced Hudson, we are compelled to reverse and remand to the district court for reconsideration of Hudson's claim.

Similarly, we hold that it was error for the court to have directed a verdict to deny the medical claims of ten of the citizens. The citizens testified as to medical complaints and also adduced the evidence of a medical doctor. The defendants presented no rebuttal evidence. The court, however, ruled: "The court thinks there's just not enough testimony in this record to justify a jury taking the time to determine whether or not they're entitled to damage because they had the stomach ache and diarrhea. Who doesn't have it occasionally?"

We hold that the court usurped the jury's function. The medical claims should have been submitted to the jury. We remand with instructions that the court do so.

(C)

We turn next to Work's claims of error with respect to the court's instructions on inverse condemnation and property damage. The citizens claim that the court erred in instructing the jury that the plaintiffs had the burden of proving "that the City of Green Forest knew by its discharge of wastewater into Dry Creek it was taking the property. . . . " According to Work, "[i]t is sufficient that the City took some action which had the effect

of taking the property. The City's intent or knowledge is not determinative." We agree.

The citizens rely on the Arkansas Supreme Court's recent decision in *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990), for the proposition that intent or knowledge is **irrelevant** to the issue of taking. The City relies on the same case for the proposition that knowledge or intent **is essential.**

Robinson involved a claim for inverse taking where the plaintiffs' home had been flooded intermittently with effluent from the city's sewer system over a nine-year period. There was no question that the city was aware of the problem. The Arkansas Supreme Court was presented with the question whether "instances of negligence, with respect to which the city has immunity from suit, may, if sustained a long time, amount to inverse condemnation." *Id.* at 227-28, 783 S.W.2d at 54. The court held that the sustained negligence did constitute an inverse taking. *Id.* at 228, 783 S.W.2d at 54.

The evidence in this case indicates that the City allowed excessive levels of effluent to enter Dry Creek for decades. The *Robinson* court explicitly stated that negligence, sustained over a long period of time, can be the basis of an inverse condemnation claim. The facts of *Robinson* do not indicate that the City in that case ever intended to take the property. Green Forest's reliance on the statement in *Robinson* that a municipality is liable when "its actions are shown to be intentional," *id.* at 232,

783 S.W.2d at 56, is misplaced. That statement does not mean that the City must have intended to take the property. Such an interpretation would contradict the holding of the case. That passage simply requires that the City intended its action, not the results of its action. The *Robinson* case controls our decision and requires that the citizens be allowed a new trial on their damage claims for inverse condemnation.

On remand, the district court is instructed to correct other errors, pointed out by the citizens and discussed below, with respect to its instructions on inverse condemnation and property damage (which errors, standing alone, might not have compelled reversal were it not for the fatal error with respect to the issue of intent).

The court erred in stating that the citizens had to show "that the taking of property occurred on or after March 3, 1984." Although it was proper for the court to apply a three-year statute of limitations to the taking claims, the Arkansas Supreme Court has made clear that the limitations period begins to run only "at the time when it becomes obvious that a permanent injury has been suffered." *City of Springdale v. Weathers*, 241 Ark. 772, 774, 410 S.W.2d 754, 756 (1967) (citation omitted). The court's instruction here did not make this clear.

We also find that it was error for the court to have instructed the jury that it was to consider "enhancement of the property, if any, to the value of such plaintiff's land which resulted from the extension of the

city water to such property." The citizens are correct that it was proper for the jury to have considered only any enhancement that **was the direct result of a taking,** *e.g. McMahan v. Carroll County*, 238 Ark. 812, 384 S.W.2d 488 (1964). The extension of city water here was not such an enhancement.

VII.

To summarize:

We hold that we are without jurisdiction to consider the denial of Work's first motion to intervene, but that we do have jurisdiction to consider the denial of the second intervention motion. Since the court erred in denying the second motion, we remand for consideration of attorneys' fees. We hold that the court properly exercised its discretion in denying Work's motion to consolidate. We hold further that the court properly dismissed the CWA claims against the City based on res judicata.

With respect to both parties' claimed errors relating to the trial of the CWA claims against Tyson, we affirm the judgment of the district court in its entirety, finding no prejudicial errors.

With respect to the trial of the common law claims against Tyson, we substantially affirm but reverse and remand in part. We hold that the court erred in directing verdicts against Patricia Hudson, against the medical claims of ten citizens, and against the citizens on their punitive damages claim. On remand, the court is instruct-

ed to submit these claims to the jury. Specifically with respect to the punitive damages claim, the court is further instructed to make rulings on the admissibility of evidence consistent with Fed. R. Evid. 403.

With respect to the trial of the common law claims of inverse condemnation against the City, we reverse and remand based on the court's erroneous instruction on the issue of intent. On remand, the court is further instructed to correct other errors with respect to its instructions.

We have considered the parties' other claims of error, and find them to be without merit.

Affirmed in part, reversed in part, and remanded.

LAY, *Chief Judge*, concurring and dissenting.

I concur in part and dissent in part. I dissent as to the district court's determination of the number of Clean Water Act violations committed by Tyson.

I dissent with regard to the court's affirmance of the Clean Water Act penalty calculation against Tyson. The district court refused to give plaintiff's proposed instruction that would have explained to the jury that each monthly average violation must be construed as thirty individual daily violations. The majority concedes that the court erred in refusing this instruction, which is

firmly rooted in the text of the Act. The jury found 43 violations, an erroneous figure that does not correspond to any view of the evidence. The district court admitted the verdict was ambiguous when the judge stated he had to "construe" the verdict to mean there were violations on forty-three separate days.

No doubt the faulty instruction confused the jury. There is nothing in the record that makes me confident that they determined the correct number of violations. Perhaps too eager to avoid relitigation of this case, the majority simply declares the error harmless and attempts no analysis or explanation for its decision. The majority goes on to affirm the judge's penalty calculations, relying on the fact that the calculations are discretionary. The judge's discretion to set the amount of the penalty, however, does not carry over into the jury's province to determine the number of violations. The judge exercised his discretion to set the amount of penalty relying on the jury's determination of the number of violations. Had the jury found a different number of violations, the judge, if he was properly enforcing the Act, would have set a different penalty. Given the serious doubt about whether the jury properly determined the number of violations, we should not let the penalty calculation stand.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al. PLAINTIFFS
vs. No. 87-2034
TYSON FOODS, INC., et al. DEFENDANTS

MEMORANDUM OPINION

This action was commenced by the plaintiffs filing the original complaint March 3, 1987. The plaintiffs sought permission and filed their second amended complaint September 16, 1988, as a civil action pursuant to the citizens suit provision, Section 505 of the Federal Clean Water Act (the Act), as amended, 33 U.S.C. §1365(a), §1365(a)(2), §1365(e), §1370, §1345, §1314, §1318(a), §13197, §1317, §1311, and §1251, together with various administrative orders issued by the Environmental Protection Agency (EPA), to the City of Green Forest (the City) and the National Pollutant Discharge Elimination System (NPDES) permit.

The plaintiffs also rely on other provisions of law for relief, including the Safe Drinking Water Act, 42 U.S.C. §300, *et seq.*, the Resources Conservation and Recovery Act (RCRA), 42 U.S.C. §6901, *et seq.*, provisions of Ark. Stats. Ann. §82-209, 220, the Arkansas Water and Air Pollution Control Act, the Arkansas Solid Waste Water Act, Ark. Stat. Ann. §82-1901 and Ark. Stat Ann. §82-2701, *et seq.*, involving state permits issued pur-

suant to state and federal laws.

Furthermore, the plaintiffs seek tort action under common law of the State of Arkansas governing riparian rights, nuisance, constructive and inverse condemnation, declaratory judgment, injunctive relief, the imposition of civil penalties, compensatory and punitive damages, and attorneys fees and costs.

It is established that this court has jurisdiction over the issues involved under Section 505(a) of the Clean Water Act, 33 U.S.C. §§1365(a), 1365(a)(2) and 1365(e), and §1370; 42 U.S.C. §1983 and §1985; 28 U.S.C. §2201 and 28 U.S.C. §1331. Venue in this case is appropriate in the Western District of Arkansas pursuant to 33 U.S.C. §1365(c).

The plaintiffs in this action gave required notice of alleged violations on November 18, 1986, and that they intended to file suit. 33 U.S.C. §1365(b)(1)(A), 42 U.S.C. §6901, *et seq.*, and 42 U.S.C. §300, *et seq.*

Originally there were approximately 106 plaintiffs joined in the case, all of whom resided in Carroll County, Arkansas.

The defendant, City of Green Forest (the City), is a municipality located in Carroll County, Arkansas, and is, therefore, a political subdivision of the State of Arkansas; the City has owned and continues to own and manage a Publicly Owned Treatment Works

(POTW) which receives waste water effluent from the residents of the City and industrial waste water from the plant of the defendant, Tyson Foods, Inc., (Tyson) located in or near Green Forest, Arkansas. To meet requirements of the Clean Water Act, 33 U.S.C. §1365, the City obtained a NPDES perk to discharge pollutants from its POTW into Dry Creek, thence to Long Creek in the White River basin. These discharges were and are discharges of pollutants into navigable waters as defined by §1362 of the Act.

Originally the Arkansas Department of Pollution Control and Ecology and the United States Environmental Protection Agency were made defendants in the lawsuit on the basis that those agencies had failed to adequately enforce the Act as required. They were dismissed by the court on a showing of their respective efforts and actions as required by law.

The defendants timely answered the complaints of the plaintiffs and have vigorously opposed the contentions of plaintiffs seeking the relief as above alleged in the plaintiffs' complaint. The defendants have denied the allegations of the plaintiffs and have made special efforts to have the alleged charges against the defendants dismissed.

Substantial discovery has been accomplished by the parties in preparation for trial on the issues in the litigation. The court conducted pre-trial hearings and finally scheduled the case for trial commencing

Tuesday, April 4, 1989. A jury was impanelled to consider and determine appropriate questions such as the common law tort claims of individual plaintiffs; the question of alleged violations of the Clean Water Act, including civil penalties; and request for injunctive relief. The trial of the case required six weeks and the testimony of numerous witnesses, including many of the plaintiffs, defendants, federal and state officers involved in the management of the pollution law affecting the environment under which people must live. Each of the parties presented expert witnesses. At the conclusion of a long and tedious trial, the court instructed the jury on the issues of law applicable for the jury's determination in the case. After the court instructed the jury on the issues involved, and counsel having presented their respective arguments to the jury, appropriate interrogatories were presented for the jury's consideration which the court determined the jury should decide. The jury deliberated on the issues presented to them for three days and returned their unanimous verdicts late afternoon of the third day.

First, the jury decided for the City on the question of discharging waste water into Dry Creek and returned a verdict in favor of the City as against the plaintiffs. Pursuant thereto, Judgment was entered on June 19, 1989, in favor of the defendant, City of Green Forest, Arkansas, and against the plaintiffs, Steve Work, et al.

On Interrogatory No. 2 the jury's verdict decided Tyson violated the Clean Water Act.

On Interrogatory No. 3 the jury decided that there were 43 separate occasions since November 16, 1981, that Tyson violated the Clean Water Act.

On Interrogatory No. 4 and final verdict by the jury awarded damages to 40 of the plaintiffs as named therein. The jury determined the damages to each for the plaintiffs as itemized damage to real property to each of the 40 plaintiffs and other compensatory damages. These verdicts were returned and filed with the court. By direction, the clerk entered judgment for each of the plaintiffs in accordance with the unanimous verdicts of the jury on June 19, 1989.

As the jury in its deliberations determined by their verdicts that Tyson was responsible for 43 violations, it becomes the duty and responsibility of this court to assess the penalty in accordance with the Clean Water Act, 33 U.S.C. §1319(d), which provides:

> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Under the provisions of the Act if a person is determined to be "in violation," it becomes the responsibility of the district court to decide the extent of the penalties as set out hereinabove. Thus, in the instant case the jury has decided unanimously that Tyson violated the terms of the Act and it becomes the duty of this court to assess civil penalties pursuant to Title 33 U.S.C. §1319(d). *Tull v. United States,* 481 U.S. 412, 427.

Although there have been differences of opinion as to the interpretation of the opinion of the United States Supreme Court in the case of *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, this court is of the opinion that the opinions by the district court, Fourth Circuit Court of Appeals, and the Supreme Court, *supra,* together with the remand to the court of appeals, thence the return to the district judge, provides a complete guide for this court in the instant case. The district court, The Honorable Robert R. Merhige, Jr., in a thorough opinion set forth the applicable law in cases involving the Clean Water Act, 33 U.S.C. §1365. The issues there are somewhat similar to the issues in the instant case. The Court explained that: "This suit is a citizen enforcement action—a 'citizen suit'—authorized by Section 505 of the Clean Water Act, 33 U.S.C. §1365. . . . The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also 'in violation of . . . an effluent standard or limitation under [the Act],' 33 U.S.C. §1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under the

Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. §1365(a). Such penalties may be as high as '$10,000 per day of such violation.' 33 U.S.C. §1365(d)."

Further, the court stated: "It is clear that, at least under the Clean Water Act, a citizen enforcer can only establish standing if it meets the requirements of 'injury in fact' set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 635 (1972)." Continuing, the court held: "In addition to the ambiguity in the words 'to be in violation' standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only—or the most—plausible one. Section 1365 states that: "The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. §1319(d)]."

33 U.S.C. §1365(a). Section 1319(d) authorizes civil penalties "not to exceed $10,000 per day of . . . violation." 33 U.S.C. §1319(d).

Also, the district court in *Gwaltney* concluded that civil penalties should be assessed.

In discussing the legislative history of the Clean Water Act, the court concluded that the Act authorizes citizen suits based on unlawful conduct that "occurred in the past regardless of whether the conduct continues through the time the complaint is filed." This decision was based on the statement made by Senator

Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act. Having reached such conclusion, the district court proceeded to impose penalties arising out of the problems with its biological treatment system and violations adduced from the chlorination waste. Penalties in the sum of $1,285,322 were assessed for such continuous violations.

In affirming the decision of the district court on the appeal, the Fourth Circuit Court of Appeals held that: (1) private "citizen suits" under the Clean Water Act could be based on past violations of the act; (2) each violation of monthly averages for discharge of pollutants amounted to a violation for each day of the month, for purposes of setting the maximum civil penalty; and (3) the district court did not abuse its discretion in setting the penalty.

To resolve conflicts in the Circuit Courts of Appeals, *see* 108 S.Ct. 380-81, the Supreme Court granted certiorari.

The case was regularly scheduled and argued October 5, 1987. The opinion of the Supreme Court was decided December 1, 1987, and delivered by Mr. Justice Marshall.

The Court held that §505(a) of the Clean Water Act authorizes private citizens to commence a civil action for injunctive relief and/or the imposition of civil penalties in federal district court against any person "al-

leged to be in violation" of the conditions of a National Pollutant Discharge Elimination System (NPDES) permit. The court further determined that between 1981 and 1984, petitioner Gwaltney repeatedly violated the conditions of its NPDES permit by exceeding authorized effluent limitations. However, said the court, due to the installation of new equipment, petitioner's last reported violation occurred in May 1985. Nevertheless, in June 1984, having given notice of their intent to sue, as required by §505(b) of the Act, respondents filed a §505(a) suit alleging that the petitioner "has violated . . . [and] will continue to violate the NPDES permit."

The Supreme Court held, *inter alia*, that the Act's legislative history indicates that §505 suits were intended to abate pollution and to enjoin continuous or intermittent violations, not to remedy "wholly past violations." "Our conclusion that §505 does not permit citizen suits for wholly past violations does not necessarily dispose of this lawsuit, as both lower courts recognized." Continuing, "The District Court found persuasive the fact that '[respondents'] allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit[,] appears to have been made fully in good faith.' . . . Because we agree that §505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation, we remand the case to the Court of Appeals for further consideration."

Continuing, the Supreme Court stated that

"Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under §505. . . . We cannot agree. The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be alleged to be in violation. . . . We agree with the Solicitor General that Congress's use of the phrase 'alleged to be in violation' reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards."

Finally, "Because the court below erroneously concluded that respondents could maintain an action based on 'wholly past violations' of the Act, it declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner. We therefore remand the case for consideration of this question."

On remand, the Fourth Circuit Court of Appeals held in a per curium opinion that "We remand to the district court for further findings as to whether, on the merits, plaintiffs proved at trial an ongoing violation. Citizen-plaintiffs may accomplish this either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition. While the district court did make subsidiary find-

ings pertinent to this case, *see, e.g.*, 611 F.Supp. at 1549 n.8, 1566 (Appendix A) it **did not** make a direct finding as to whether citizen-plaintiffs proved the existence of intermittent or sporadic violations constituting an ongoing violation."

The court went on to say "Consistent with the guidance of the Supreme Court majority and concurring opinions, the district court may wish to consider whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit."

On receiving the remand in carrying out the direction of both the Supreme Court and the Fourth Circuit Court of Appeals, District Judge Merhige acknowledged that the Fourth Circuit Court provided considerable guidance for determining whether an ongoing violation has been shown. The court may find that an ongoing violation has been proved if at trial the plaintiffs either "(1) . . . prov[ed] violations that continue[d] on or after the date the complaint was filed, or (2) . . . adduc[ed] evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988) ("Remand Opinion").

Therefore, Judge Merhige concluded that "the mandate in this matter is clear and unequivocal: this court is to determine whether 'plaintiffs proved at trial an ongoing violation' as defined by the Fourth Circuit."

Further, he stated that "having found that the evidence adduced at trial shows a reasonable continuing likelihood of a recurrence of intermittent violations at the time the action was filed, the court finds that plaintiffs proved an ongoing violation. The original judgment of the Court imposing upon Gwaltney a total civil penalty of $1,285,322 shall be reinstated." *Chesapeake Bay Found. v. Gwaltney of Smithfield,* 688 F.Supp. 1078-80.

Therefore, the ultimate and final decision in the *Gwaltney* case resulted in a judgment of civil penalty as stated hereinabove. After having heard, and having benefit of the entire record in the instant case, it is the opinion of this court that it parallels virtually to the point the result in the *Gwaltney* case, *supra.*

As an example, in the instant case the court submitted Interrogatory No. 2 to the jury as follows: Do you find from a preponderance of the evidence that the defendant, Tyson Foods, Inc., violated the Clean Water Act? The unanimous decision of the jury on the question was "Yes." Along with this interrogatory the court instructed the jury, No. 23, as follows: "If you find by a preponderance of the evidence that Tyson Foods, Inc., has violated the Clean Water Act by causing the City of Green Forest, Arkansas, to violate a provision of its

Clean Water Act permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act. In order to make this determination, you must determine how many violations by the City of its Clean Water Act permit were caused by Tyson."

In that the jury determined by its verdict, Interrogatory No. 2, that the defendant, Tyson Foods, Inc., violated the Clean Water Act, together with its response to Instruction No. 23, the jury determined that there were 43 violations within the period of time commencing with November 16, 1981. The jury having reached its decisions by the return of their verdicts that Defendant Tyson was responsible for Green Forest having violated the City's permit, it now becomes the responsibility of this court to determine the penalties that should be assessed for "such violations."

It is an established fact that Tyson Foods was involved in a number of pollution controversies commencing at least during the seventies. It is an established fact of record that Tyson Foods was a part of and committed ongoing violations of the Clean Water Act since well before March 1984. Tyson Foods has also been involved in litigation involving disposal of waste water under the laws of Arkansas. It is also an established fact that Tyson has been charged with ongoing violations of the Clean Water Act in a fairly recent decision, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 682 F.Supp. 1186 (N.D. Ala. 1988), two cases, where defendant's two commercial plants were involved in proceedings

arising under the Federal Water Pollution Control Act as reported March 4, 1988.

A review of the plaintiff's second amended complaint makes it indelibly clear that the plaintiffs have made good-faith allegations of ongoing violations by Tyson. The citizen-plaintiffs in this case have alleged continuous or intermittent violations in an effort to establish a "reasonable likelihood" that Tyson's utilization of the facilities of Green Forest will repeat such violations. As already stated, Green Forest was and is operating under a permit from both EPA and the state agency.

It has been established by substantial testimony in the trial of this case of intermittent violations occurring before November 1985. The plaintiffs have alleged and have attempted to prove such violations to be ongoing until a date when there would be no likelihood of repetition. It is the opinion of the court that testimony at the trial was received by the court and jury that established at least some reasonable likelihood of a recurrence of intermittent violations by the defendants.

Defendant Tyson has strongly contended that a new facility of the defendant was undertaken and is now in place, operating to alleviate the previous violations at a cost in excess of a million dollars. The defendants insist that the flow of wastewater from its plant through the facility of Green Forest would prove and has already without question alleviated the previous violations.

Many witnesses on behalf of the plaintiffs have insisted that there have been intermittent and sporadic violations since the facility of Tyson became operational November 1985. In fact, it developed during the closing days of the trial that extensive oil and sludge occurred in Dry Creek which caused accusations by both parties. It is a fact that there was waste that occurred in Dry Creek which the plaintiffs said came from the Green Forest facility and the defendants claimed was an act brought on by the plaintiffs.

This court, having concluded that there was substantial evidence adduced at the trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating, and that there was alleged good-faith allegations of the plaintiffs of ongoing violations and pursuant to the verdicts returned by the jury, now has the responsibility of to make a determination of reasonable penalties as required by 33 U.S.C. §1365. This court has no hesitancy and concludes that the record clearly establishes good-faith allegations by the plaintiff as included in the complaint and the reasonable likelihood of repetition under the arrangements between Tyson and the City of intermittent and sporadic violations at some period in the future.

In consideration of civil penalties for the violations of the Clean Water Act as found by the jury, the court would first consider the testimony by both par-

ties. In applying the facts as developed during the trial, the court should keep in mind the extent of violations as well as the number of violations through the years. As already noted, the jury concluded by its verdicts that there were 43 violations during the period of time applicable to this litigation. The court construes the decisions of the jury to be that there were violations of 43 separate days.

Obviously the court in consideration of assessing penalties in this case would give great weight to verdicts returned in the case by the jury on the questions submitted to the jury for their determination.

The attention of the court has been called to the policy by EPA in arriving at just and reasonable penalties under the statute. There are two documents containing the policy of EPA as noted: Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments. The first document focuses on the general philosophies behind the penalty policy. The second document provides guidance to each program on how to develop medium-specific penalty policies. Additionally, there have been some recent cases in Arkansas wherein Consent Judgments were entered in settlements involving, *inter alia* civil penalties. *United States v. City of Berryville,* Case No. 87-3010, Consent Decree as to Berryville entered October 1, 1987. Also the court is pleased to have the recommendations of Honorable Anne Roberts Bobo, Attorney for the Arkansas Department of Pollution Control & Ecology in amicus curiae brief submitted for the court's consideration.

Ability to pay and litigation considerations are included in the factors to be considered in arriving at a just and equitable decision.

In consideration of these factors, and the court having presided over the trial of the case, it is the opinion of the court that the maximum penalty for each violation that could be assessed in the case would be unnecessary. Applying the maximum under the Act would subject the defendant to civil penalties in the sum of $430,000.

It is the considered judgment of this court that a civil penalty of $1,000 for each of the 43 violations would be reasonable, just and equitable. Therefore, the court will enter a final judgment against the defendant, Tyson Foods, Inc., in the sum of $43,000 as total penalty for violations in accordance with the unanimous verdicts of the jury.

The court incorporates into this Memorandum Opinion its findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure.

A judgment will be entered in accordance with this opinion. DATED this 23rd day of August, 1989.

United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al. PLAINTIFFS
vs. No. 87-2034
TYSON FOODS, INC., et al. DEFENDANTS

FINAL JUDGMENT

Pursuant to the trial record in this case, briefs filed by counsel and Memorandum Opinion entered as of this day,

IT IS HEREBY ORDERED AND ADJUDGED that judgment as civil penalties in the total sum of $43,000 be and the same is hereby entered against the defendant, Tyson Foods, Inc., in this case.

DATED this 23rd day of August, 1989.

United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al. PLAINTIFFS
vs. No. 87-2034
TYSON FOODS, INC., et al. DEFENDANTS

ORDER

This case was tried to a jury and it was concluded by the jury's verdicts returned on May 12, 1989. Counsel for the defendant, Tyson Foods, Inc., (Tyson) has filed pursuant to Rule 50 of the Federal Rules of Civil Procedure for a Motion for Judgment Notwithstanding the Verdict. Counsel for the defendant purposes that the court set aside the jury verdict and in lieu thereof enter a judgment on behalf of Tyson.

Brief on behalf of the defendant has been filed in support of the Motion for Judgment Notwithstanding the Verdict.

The court presided over the trial of the case for a period of six weeks. During this time the court observed and otherwise became familiar with the issues between the parties. The court has the benefit of the record in the case, numerous arguments between counsel and the verdicts rendered by the jury.

In consideration of the court's observation

and in consideration of many factors and points raised during the course of the trial, an extensive recitation would be unnecessary. Having presided over the trial of the case and becoming familiar with the contentions of both parties, the court is of the opinion that the Motion for Judgment Notwithstanding the Verdict is without merit.

IT IS THEREFORE ORDERED AND ADJUDGED that the motion of the Defendant Tyson for Judgment Notwithstanding the Verdict be and the same is hereby denied.

DATED this 23rd day of August, 1989.

United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al. PLAINTIFFS
vs. No. 87-2034
TYSON FOODS, INC., et al. DEFENDANTS

ORDER

Before the Court is a Motion for Reconsideration, For New Trial or For Judgment Not On The Verdict filed on behalf of Defendant Tyson Foods, Inc.

On the 24th day of August, 1989, the Court entered an Order denying a Motion for Judgment Notwithstanding Verdict previously filed on behalf of Defendant Tyson Foods, Inc., and set forth the reasons therein.

The Court has reviewed the motion and brief in support thereof and responses thereto. From such review and upon the record as a whole, the Court finds the contentions of Defendant Tyson Foods, Inc., to be totally without merit and should be denied.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the Motion on behalf of Defendant Tyson Foods, Inc., for Reconsideration of the Order denying the Motion for Judgment Notwithstanding Verdict, be and the same is hereby denied.

DATED this 27th day of November, 1989.

United States Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-1661/2549/2636/90-1011/1041WA

LEWIS STEPHEN WORK, et al.

Appellants/cross-appellees,

v.

The City of Green Forest, Arkansas, et al.

Appellees/cross-appellants

ORDER DENYING PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Suggestion for rehearing en banc from appellees/cross-appellants Tyson Foods, et al., has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petitions for rehearing by the panel from appellants/cross-appellees Stephen Work, et al., and by appellees/cross-appellants Tyson Foods, et al., are also denied.

February 14, 1991

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

No. 90-1774

Supreme Court, U.S.
FILED
JUN 13 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

TYSON FOODS, INC.,

Petitioner,

vs.

LEWIS STEPHEN WORK, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT WORK, ET AL.'s BRIEF IN OPPOSITION TO PETITIONER TYSON FOODS, INC.'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Tyson's Statement of the Case is misleading in that it refers to compliance with "local limits" as if this were an established fact. *See,* Tyson's Statement of the Case, p. 6, para. 3, Tyson's Petition for Writ of Certiorari. Tyson failed to establish this defense below due to the fact there was never a "local limit" established at Green Forest in accordance with applicable EPA regulations. Consequently, both the trial court and the Eighth Circuit rejected this argument. *See, EPA vs. City of Green Forest,* 921 F.2d 1394, at 1406 (8th Cir. 1990). Accordingly, Tyson could only escape liability for violating the CWA by not violating the general prohibition against pass-through and interference, which is to say, by not causing the City to violate its CWA permit. Compliance with the pretreatment limits which Tyson dictated to the City was no defense.

A more complete Statement of the Case is contained in respondents' Petition for Writ of Certiorari filed in this same matter on May 15th, 1991, as Case No. 90-1768 (October 1990 term).

ARGUMENT

I.

RESPONDENTS, WORK ET AL., MET THIS COURT'S STANDARD ESTABLISHED IN *GWALTNEY.*

This Court in *Gwaltney of Smithfield, Ltd. vs. Chesapeake Bay Found., Inc.,* 484 U.S. 49 (1987), held that a citizen's suit under the CWA could not be maintained based wholly on past violations of the Act. In order to invoke the court's jurisdiction under the Act, a citizen-plaintiff must set forth good faith pleadings evidencing a

legitimate prospective concern. *Atlantic States Legal Found., Inc. vs. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990).

Every circuit court which has considered the *Gwaltney* decision in connection with this jurisdictional issue has concluded that citizen-plaintiffs may satisfy the prospective concern requirement either by (1) demonstrating that violations were occurring on or after the date of the complaint, or (2) by demonstrating facts in existence at the time the complaint was filed which would indicate a continuing likelihood of recurring violations on an intermittent or sporadic basis in the future. *See, Chesapeake Bay Found. vs. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988); *Sierra Club vs. Union Oil Co. of Calif.*, 853 F.2d 667, 670 (9th Cir. 1988); and *Carr vs. Alto Verde Indus., Inc.*, 924 F.2d 558, 560 (5th Cir. 1991).

The trial court determined that respondents Work et al. had demonstrated a reasonable likelihood of ongoing future violations. After hearing all the evidence, the trial court concluded " . . . there was substantial evidence adduced at trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating . . . ". *Work, et al. vs. Tyson Foods, Inc., et al.*, 720 F.Supp. 132, 138 (W.D. Ark. 1989). The facts adduced at trial support the trial court's finding that respondents Work et al. met their burden under *Gwaltney, supra*.

First, it should be noted that the undisputed evidence shows that the City was violating its CWA permit when respondents Work et al. sent their 60-day notice letter in

November 1986, when they filed suit in March 1987, and for approximately 18 months thereafter. It was also undisputed that Tyson was the *only* significant industrial contributor to this POTW and totally dominated the POTW, being responsible for 80-90% of the plant's loading and volume. The summer before respondents Work et al. filed suit, there was a massive fish kill in Dry Creek which was initially attributed to Tyson by the State agency investigating the incident. At trial, Tyson disputed its role in that incident and presented conflicting evidence as to its cause. Also, when respondents Work et al. filed suit, the City had failed to meet its deadlines for construction of a new POTW and Tyson had announced plans to increase production at its Green Forest plant.

At the time this suit was initiated, the situation closely resembled that of the early 1970's when a few of the respondents in this case sued in State Court to prevent Tyson's then-subsidiary, Franz Foods, from polluting Dry Creek by running its waste through the City's inadequate and overloaded POTW. Green Forest constructed a new "state-of-the-art" plant to handle Tyson's waste and a settlement agreement was concluded with Tyson in 1976, wherein Tyson agreed to cease causing pollution in Dry Creek. However, as indicated by the record in this case, Tyson breached its contract almost immediately, and resumed its pollution of Dry Creek by repeatedly expanding its production facilities and overloading the City's POTW.

David Derrick, an engineer with experience in wastewater treatment facilities and industrial pretreatment, testified that Tyson's contribution to the POTW at the time respondents Work et al. filed their complaint was

causing the City to violate certain parameters of its NPDES permit and also causing an increase in the magnitude and duration of violations of other parameters. Mr. Derrick testified that the permit violations would have been less frequent and less severe but for Tyson's contribution to the POTW. This is, of course, after Tyson had installed its pretreatment facility and at the time respondents Work et al. filed suit. Mr. Derrick also testified that Tyson could have installed a much more sophisticated pretreatment facility which would have resulted in Tyson's contribution to the POTW being of a higher quality, thereby improving the POTW's performance.

In its written opinion, the trial court noted that an upset occurred at the POTW during the final days of trial. Respondents Work et al. videotaped this incident and presented it to the jury. 720 F.Supp. at 138. The tape reflected a situation in Dry Creek showing foam and floating waste solids in the creek, which flows across petitioners' properties – conditions which again represented violations of the City's NPDES permit. The State ultimately attributed this event to excessive oil and grease in Tyson's waste due to a new process implemented at the Tyson facility. After the trial, the State filed a brief asking that the trial court fashion injunctive relief against Tyson to prevent this from occurring in the future.

Finally, at the time of suit, both the City and Tyson were spreading a semi-solid sludge throughout Carroll County, including into the Imminent Health Threat Zone, raising concerns that this material was flowing onto surface waters in the vicinity of property owned by respondents Work, et al.

With the City in actual violation at the time the suit was filed, with Tyson's history of causing pollution in Dry Creek even after remedial measures were taken, and continued domination of the City's out-of-compliance POTW, with plans in place for yet further expansion of Tyson's Green Forest processing facilities, and the dumping of sludge in the Imminent Health Threat Zone, the trial court clearly had no choice but to find a basis existed for plaintiffs' prospective concerns at the time the suit was filed.

In summary, the instant case did not turn upon any subtle or ambiguous aspect of the *Gwaltney* decision. Rather, the outcome was driven by facts. The respondents are unaware of any glaring dichotomy in the circuit court decisions which the instant case serves to highlight or otherwise frame. Petitioner makes reference in its writ to Justice Scalia's concurring opinion. However, presumably the majority was aware of Justice Scalia's position when their opinion was written. At any rate, the subtle difference between Justice Scalia's position and that of the majority would not have altered in any way the outcome in this case. There simply is no basis for revisiting *Gwaltney* in the context of this particular suit.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE STANDARD APPLICABLE TO INDIRECT DISCHARGER LIABILITY UNDER THE CWA.

Under the CWA, § 307(b)(1) [33 U.S.C. § 1317(b)(1)], an indirect discharger [that is, one who discharges its wastes into a publicly owned treatment works ("POTW"),

rather than directly into the nation's waterways], is prohibited from discharging waste to a POTW which either passes through the POTW without receiving adequate treatment, or interferes with the POTW's ability to adequately function. Tyson is such an indirect discharger in this case, and therefore was under this statutory prohibition. Tyson argued below, *inter alia*, that the trial court improperly instructed the jury on the standard applicable to indirect dischargers. The Eighth Circuit, however, correctly found that the jury was properly instructed on the standard pertaining to indirect discharger liability under § 307(b)(1) of the CWA [33 U.S.C. § 1317(b)(1)]. The trial court's instruction on this point (Instruction No. 23) stated:

> If you find by a preponderance of the evidence that Tyson Foods, Inc., has violated the Clean Water Act by *causing* the City of Green Forest, Arkansas, to violate a provision of its Clean Water Act permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act. In order to make this determination, you must determine how many violations by the City of its Clean Water Act permit were caused by Tyson. (emphasis added).

Applying this instruction, it is clear that the jury could only find that Tyson violated the CWA by finding that Tyson had *caused* the City to violate its NPDES permit. There is nothing which supports Tyson's position that anything further is required to establish a finding of indirect discharger liability under the Act. Tyson's argument is essentially an effort to confuse this issue by urging an interpretation of *National Ass'n of Metal Finishers vs. EPA*, 719 F.2d 624 (3d Cir. 1983), [rev'd on other

grounds, *Chemical Mfrs. Ass'n vs. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985)] ("*NAMF*"), to require a finding that an indirect discharger must cause *and significantly contribute* to a POTW's permit violations to be liable. Clearly, this was not the intended result.

NAMF dealt with an industry challenge to the EPA's regulatory definitions of "pass-through" and "interference." There, the court did remand the definition of "interference" to the EPA after finding that liability premised solely on an indirect discharger's "significantly contributing to" a POTW's noncompliance with its permit could potentially result in a finding of liability without *causation*. The court held that such a result would be contrary to the intent of the CWA. The court did not (despite Tyson's novel attempt to misconstrue the court's language) require *both* a finding of causation *and* a separate finding that the indirect discharger *significantly contributed* to the POTW's permit violations before liability would attach.

> We conclude that, given the language and purpose of the Act, an indirect discharger cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation or sludge problem.

NAMF, 719 F.2d at 641.

To accept Tyson's argument that there must be a finding that the indirect discharger both caused the permit violation and significantly contributed to the same permit violation would be to abandon common sense. It is implicit in a finding of causation that an indirect

discharger has also significantly contributed to the POTW's permit violations.[1]

This is not an issue which would be proper for certiorari to this Court. There is no conflict between the circuits over the standard applicable to indirect dischargers such as Tyson. There have been no other instances of either EPA or citizen enforcement against indirect dischargers where confusion has arisen over this

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[1] Tyson refers in fn. 5 to its argument below that no regulatory definition of "pass-through" or "interference" existed after *NAMF*, and thus it could not be liable under §307 of the Act. 33 U.S.C. §1317 or §307. This argument was rejected below, and it appears from Tyson's passing reference to this argument that it has now resigned itself to this fact. The *NAMF* court did not invalidate the *prohibition* against pass-through and interference, but only the regulatory *definitions* of those terms. The court refused to remand the general prohibitions contained at 40 C.F.R. §403.5 in reaching its decision. 719 F.2d at 641, fn.17. The general prohibitions contained at 40 C.F.R. §403.5, "which provide the framework for the national pretreatment program, were not at issue in the *NAMF* litigation and have continued in effect." 52 *Fed. Reg.* 1588 (1987).

Also Tyson's own representative in charge of environmental matters, Mr. Louis Williams, testified he was well aware of Tyson's duty not to cause the City's POTW to violate its permit limits. Thus, it is clear Tyson was aware of its duties under §307, did not need a less ambiguous regulatory definition to understand those duties, and simply chose to ignore the requirements of the CWA, pollute indiscriminately, and avoid the cost of compliance until this course of conduct was no longer available. Had Tyson's argument on this point been accepted, there would have been no standard applicable to indirect dischargers, such as Tyson, under the Act and §307 would have been meaningless. Surely the prohibition against pass-through and interference contained in §307 of the Act would prevent such an absurd result.

issue. Likewise, there has been no confusion (with the possible exception of that which apparently exists in the minds of Tyson's legal counsel) as to an indirect discharger's duties under the Act. Again, Tyson's own employees testified they understood their duties in this regard. Thus, there is no basis under Sup. Ct. Rule 10 to review this issue.

III.

RESPONDENTS DO NOT SEEK PUNITIVE DAMAGES UNDER THE CWA, AND AN AWARD OF SUCH DAMAGES UNDER RESPONDENTS' COMMON LAW ACTIONS WOULD VIOLATE NEITHER THE EIGHTH NOR FOURTEENTH AMENDMENTS.

It appears that petitioner Tyson actually raises three separate issues with regard to punitive damages. First, it appears to argue that respondents Work et al. cannot recover punitive damages under the Clean Water Act. Second, petitioner argues that an award of punitive damages to respondents would violate the Eighth Amendment's prohibition against excessive fines. Third, petitioner alleges that a punitive damage award would violate the due process clause of the Fourteenth Amendment, on the grounds that there is an alleged deficiency of statutory or common law guidelines by which to channel the jury's discretion in this regard.

In framing the issues which petitioner seeks to have this Court consider in connection with respondents' claim for punitive damages, Tyson mischaracterizes the situation in its entirety. Specifically, petitioner Tyson attempts to argue that respondents Work et al. are asserting a punitive damage claim based on Tyson's violations of the

Clean Water Act, and even assert that " . . . petitioners have been unable to find any cases in which the EPA has recovered punitive damages from one violating the Act . . . " (*See*, Tyson's Petition, fn. 9, p. 19).

This is frankly a non-issue, for the simple reason that respondents have never sought punitive damages on the basis of Tyson's violation of the Clean Water Act, and the Eighth Circuit – in determining below that plaintiffs were entitled to a punitive damages instruction – did not make that determination on the basis of the CWA.

The respondents in this case are neither a public interest group nor an environmental coalition; rather, they are individual victims of Tyson's unlawful activities who have personally sustained damages as a result of Tyson's inappropriate conduct. Respondents, in initiating this case, brought two separate types of action against Tyson. One cause of action, the CWA citizens' suit, was brought to enforce the Clean Water Act against Tyson and seeks the assessment of penalties for its public wrongs. The other actions brought are the private common law causes of action, seeking compensation and punitive damages for the private wrongs committed against the individual respondents by Tyson.

Penalties assessed under the Clean Water Act are assessed on a strict liability basis, without regard to either the violator's intent or whether there has been any private wrong or damage caused. Under Arkansas common law, punitive damages turn upon the *state of mind* of the actor, and require private harm to have occurred from the conduct. Tyson's violations of the CWA were neither sufficient nor necessary to give respondents the right to

seek punitive damages under Arkansas law. Rather, it was Tyson's willful disregard of respondents' rights and interests while pursuing its own interests that establishes the basis of respondents' punitive damages claim.

Tyson points to no case law holding that enforcement of a public sanction against a wrongdoer in any way precludes an award of punitive damages in a private cause of action brought by victims of the wrongdoing. Further, the CWA itself expressly states:

> (e) *Statutory or common law rights not restricted.* Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute *or common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a state agency). [emphasis added]

33 U.S.C. §1365(e).

With regard to the Eighth Amendment issue raised by petitioner, it is clear from this Court's decision in *Browning-Ferris Indus. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), that the Eighth Amendment's prohibition against excessive fines does not relate to private causes of action. Since petitioners' claim for punitive damages in this case arises only out of their common law cause of action against Tyson for the wrongs it committed against them personally, and no portion of the funds thus awarded will inure directly to the benefit of the government, the Eighth Amendment does not apply.

Concerning petitioner's due process argument, this Court recently considered and exhaustively discussed

that issue in the case of *Pacific Mut. Life Ins. Co. vs. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991). It would seem most unlikely that the Court would be interested in taking up another case on this issue so soon after *Haslip*, and especially not one in which punitive damages have yet to be awarded, no jury instruction has been given, and no review process has taken place. *Also, the Eighth Circuit recently remanded a punitive damage case for a determination of constitutionality of Arkansas' own punitive damages law. That determination may moot this argument.*

Finally, respondents should point out that, while Tyson made passing reference to these issues at various stages in the litigation, those references were general in nature, and the courts below have not been called upon to deal with them directly. Both the trial court and the Eighth Circuit's decisions with regard to the punitive damage issue have turned on interpretations of Arkansas common law, not Eighth and Fourteenth Amendment considerations. Of course, this is because the Eighth Amendment clearly does not apply, and there has been no process related to punitive damages to review with regard to the due process requirements of the Fourteenth Amendment. The fact remains that a review of petitioner's issues concerning punitive damages on the current record would have to be conducted without benefit of actual consideration of the issue by the courts below.

CONCLUSION

Wherefore, respondents pray that petitioner Tyson Foods, Inc.'s petition for a writ of certiorari to the United States Court of Appeals to the Eighth Circuit be denied.

Respectfully submitted,

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